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JDSSW-ZA (715)

**MEMORANDUM FOR EXECUTIVE OFFICERS, FISCAL OFFICERS AND SUPPLY
COORDINATORS**

SUBJECT: The Defense Supply Service-Washington (DSS-W) Acquisition Guide

This Revision updates and expands our original Acquisition Guide, dated 28 June 1995. We developed the Guide to assist our customers and acquisition personnel in requisitioning supplies, services, telecommunication and Federal Information Processing (FIP) resources. I urge you to read the Guide carefully so you will have a better understanding of what is required during the requisitioning and procurement process and how the DSS-W can assist you in meeting your goals.

Your comments and suggestions on this Guide are requested and welcomed. My point of contact, Mrs. Shirley Gragg, DSS-W Policy and Compliance Branch, can be contacted by phone (703) 693-1345, e-mail: Shirley.Gragg@hqda.army.mil or FAX at (703) 695-9760.

A handwritten signature in black ink, appearing to read 'Kimberley T. Smith', with a stylized flourish at the end.

KIMBERLEY T. SMITH
Colonel, U. S. Army
Commander

Attachment

PREFACE

This Acquisition Guide is a reference for preparing different types of contracts and small purchase request documents. It is designed to assist our customers, our acquisition personnel, and any others that may find this document useful in preparing the documents to facilitate and accelerate the procurement process.

The examples provided in this Guide must be further tailored to meet the unique acquisition methods, strategies, and requirements of each acquisition. Significantly revised or new entries added to this edition are indicated by an asterisk (*) on the right side of the page.

The Defense Supply Service-Washington (DSS-W) will strive to keep this document accurate and current with the changes in law and policy; however, the current law and policy will take precedent over any item in this handbook.

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PART 1

THE BASICS

CONTRACT REQUIREMENTS PACKAGE CHECKLIST

Description of Item or Action (as required)		Included	N/A
1.	Transmittal Memo to the DSS-W (for contracts in <u>excess</u> of the Simplified Acquisition Threshold):	<input type="checkbox"/>	<input type="checkbox"/>
	a. Estimated Cost	<input type="checkbox"/>	<input type="checkbox"/>
	b. Funding Planned by Year	<input type="checkbox"/>	<input type="checkbox"/>
	c. Explanation of Multiple Funds	<input type="checkbox"/>	<input type="checkbox"/>
	d. Required Sources of Supply	<input type="checkbox"/>	<input type="checkbox"/>
	e. List of Known Potential Source(s)	<input type="checkbox"/>	<input type="checkbox"/>
	f. Consideration of Small Business or 8(a) Contractor	<input type="checkbox"/>	<input type="checkbox"/>
	g. Point of Contact (POC) for This Action	<input type="checkbox"/>	<input type="checkbox"/>
	h. Nomination of COR	<input type="checkbox"/>	<input type="checkbox"/>
2.	Funding Authorization Document	<input type="checkbox"/>	<input type="checkbox"/>
3.	Statement of Work	<input type="checkbox"/>	<input type="checkbox"/>
4.	Executive Summary	<input type="checkbox"/>	<input type="checkbox"/>
5.	Justification and Approval (J&A)	<input type="checkbox"/>	<input type="checkbox"/>
6.	Determination and Findings for Government Furnished Equipment/Property	<input type="checkbox"/>	<input type="checkbox"/>
7.	Evaluation Criteria/Source Selection	<input type="checkbox"/>	<input type="checkbox"/>
8.	Contractor Past Performance Evaluation	<input type="checkbox"/>	<input type="checkbox"/>
9.	Acquisition Plan	<input type="checkbox"/>	<input type="checkbox"/>
10.	Independent Government Estimate (IGE)	<input type="checkbox"/>	<input type="checkbox"/>
11.	Ozone Depleting Chemical Statement	<input type="checkbox"/>	<input type="checkbox"/>
12.	Access to Classified Material (DD Form 254)	<input type="checkbox"/>	<input type="checkbox"/>
13.	Transportation Requirements	<input type="checkbox"/>	<input type="checkbox"/>
14.	Contract Data Requirements List (CDRL)	<input type="checkbox"/>	<input type="checkbox"/>
15.	Data Item Description (DID)	<input type="checkbox"/>	<input type="checkbox"/>

In addition to the above, add the following documents for FIP Resources:

16.	Director of Information Management (DOIM) Approval	<input type="checkbox"/>	<input type="checkbox"/>
17.	Information Technology (IT) and National Security System (NSS) IT Acquisition Oversight Policy	<input type="checkbox"/>	<input type="checkbox"/>

EXPLANATION OF TERMS FOR CONTRACT REQUIREMENTS PACKAGE CHECKLIST

1. Transmittal Memo to DSS-W. As applicable, include the following subjects in the Transmittal Memo for contracts in excess of the Simplified Acquisition Threshold. Additional topics may be included at the Agency's discretion.

a. Estimated Cost. This is the total from the Independent Government Cost Estimate. This gives the contracting specialist a quick idea of the type of acquisition process required and what items to look for in the Contract Requirements Package (CRP).

b. Funding Planned by Year. The amount to be funded for each year and the sources of funds.

c. Explanation of Multiple Funds. Many contracts have more than one source of funds even for the same year. For example, if two offices were going to both benefit from some work there may be an arrangement for partial funding from both.

d. List of Known Potential Sources. This is helpful in targeting available sources of supply and services for contracts in excess of the Simplified Acquisition Thresholds. Include contact points, telephone and FAX numbers.

e. Required Sources of Supplies and Services. In accordance with FAR 8.001, agencies shall satisfy requirements for supplies and services from or through the sources and publications listed in Part 3 of this Guide, in descending order of priority.

f. Consideration of Small Business or 8(a) Contractor.

(1) Small Business Set Aside. In accordance with FAR 19.502, acquisitions must be set aside for small business when there is a reasonable expectation that offers will be received from at least two responsible business concerns and award will be made at a fair market price.

(2) 8(a) Business Program. Section 8(a) of the Small Business Act (15 U. S. C. 637(a)) established a program that authorizes the Small Business Administration (SBA) to enter into all types of contracts with other agencies and let subcontracts for performing those contracts to firms eligible for program participation. The SBA's subcontractors are referred to as 8(a) contractors. Depending on the dollar value, contracts may be awarded to the SBA for performance by eligible 8(a) firms on either a sole source or competitive basis.

(3) Please consult the contracting officer on either program.

g. Point of Contact (POC) for This Action. The name, address and phone number of the requiring activity's person most knowledgeable about this action. It is wise to list an alternate to avoid delays.

h. Contracting Officer's Representative (COR) Designation, Duties and Responsibilities. The COR is the requiring activity's technical expert for the performance of the contract. COR functions usually include receiving the briefings and deliverables, signing the receiving reports and monitoring the contract to protect the Government's interest. (See information in this Part for COR duties and responsibilities.)

2. Funding Authorization Document. Required on all acquisitions, regardless of dollar value. This is part of Defense Supply Service Automated Requisition Tracking System (DARTS) for automated DSS-W customers. For others, this is a hard copy DD Form 1262 signed by the Supply Coordinator and the designated financial official. The designated financial officer is responsible for ensuring the proper use of appropriated funds (see Part 2, Federal Appropriations law). (See Part 10 for a sample of the form.)

3. Statement of Work (SOW). When applicable. This is basic to most of the contract requirements packages. The Government should only identify its minimum requirements in the SOW. The requirements should be written clearly and provide for functional or performance standards which must be achieved. It is DoD policy to satisfy its requirements through competitive acquisition of commercial items. The SOW defines the efforts to be performed by the contractor. Specifications describe the items or products to be provided. (FAR 10.000) There are no set sections or procedures for preparing a SOW, since it varies by type of product or service being requested. All SOWs are specific to the particular procurements. Although SOWs may not follow a definitive format, in general, the sections should be:

- a. Scope (Objectives and Background)
- b. Applicable Documents
- c. Specific tasks
- d. Deliverables
- e. Special Considerations
- f. Contract Line Item Number(s) (CLINS). List if request is for supplies or services - i.e., Information Technology (IT) supplies or services.

4. Executive Summary. This is required for all acquisitions above the Simplified Acquisition Threshold (SAT). This is a brief summary of what is needed and is used by the contract specialist to prepare the Synopsis for publication in the Commerce Business Daily (CBD). Various examples are shown in this Part of the Guide.

5. Format for a Justification Review Document for Other Than Full and Open Competition. Unless otherwise prescribed by the Federal Acquisition Regulation, requirements exceeding \$500,000 that restrict competition to one source or limited sources need a Justification and Authorization (J&A) for Other Than Full and Open Competition. One question raised is whether restricting the requirement to a specific brand name needs a J&A. The answer is "Yes,"

if the requirement exceeds \$500,000, regardless of whether there are multiple distributors who would subsequently compete for this restricted requirement. Guidance for preparation of a J&A is found in this Part of the Guide. If further assistance is required, contact the DSS-W Policy and Compliance Branch at (703) 693-1345.

6. Determination and Findings for Government Furnished Equipment (GFE)/Government Furnished Property (GFP)/ Government Furnished Information (GFI). As required. This is a Determination of those items which will be provided to the contractor which is required for the performance of the SOW. Be careful that the items are available at the time of award. If not, it may be more advantageous to the Government not to include GFE. When required, the list must be included in the SOW.

7. Evaluation Criteria, Source Selection Considerations and Evaluation Plan. As required. There are two basic ways of selecting offerors when some type of “Best Value” assessment is to be done. One way is to select the lowest priced, technically acceptable offeror. Another method permits the Government to select the source whose proposal offers the greatest value in terms of performance and other factors, even though that offer may not be the lowest in cost or price. In the latter case, weighted evaluation factors must be set forth in the Source Selection Plan. Examples of such factors include, as appropriate, adequacy of technical approach, understanding of the problem, personnel qualifications, corporate capability, and past performance. Price is never point scored, but is always a factor in award. The Source Selection Plan must always be marked "SOURCE SELECTION INFORMATION", "PROCUREMENT SENSITIVE - FOR OFFICIAL USE ONLY". (See Part 9, for sample.) Reference: FAR 15.6, DFARS 15.6, DoD Directive 4105.62, AFAR 15.6, AR 70-1, and Armed Services Pricing Manual (ASPM), Volumes. 1 & 2.

8. Past Performance Evaluation. A contractor’s past performance record is a key indicator for predicting future performance. A satisfactory performance record is a prerequisite to being determined a “responsible source.” Additional information on “Past Performance Evaluation” can be found in this Part of the Guide.

9. Acquisition Plan. An Acquisition Plan (AP) must include a description of the steps and timetable to be employed to manage the entire acquisition process from beginning to end. This includes a flow chart with milestones and agreed upon schedules between the customer and the contracting office. The agreements include statements such as, "The draft SOW will be delivered to the Contract Specialist by xx date." and "The Contract Specialist will annotate the draft SOW and return to the customer by xx date." Usually, the customer has a set date for the contract to be started. Other dates may be determined by "back-tracking" from the required contract start date. A detailed description of what is required in an AP is shown in this Part.

10. Independent Government Estimate (IGE). An IGE, to be certified by the requiring activity, is required with all procurement actions in excess of the Simplified Acquisition Threshold. When buying commercial, over-the-shelf (COTS) items, customers can use a price list, catalog, etc. to assist in preparing the IGE. (Sample formats and instructions are shown in this Part of the Guide.)

11. Ozone Depleting Chemical Statement. As required. Are any Ozone Depleting Chemicals such as chloro-hydrocarbons and freon required? If so, a flag officer or SES in the acquisition chain of command of the requiring activity must approve the requisition after obtaining a certification that there is no substitute or alternative technology from the Army Acquisition Pollution Prevention Support Office (703)-274-0815 or the DoD Standardization Program Division (703)-756-2340.

12. Access to Classified Material. A completed DD Form 254 or a statement that there is no need for access to classified material is required for all contracts. Instructions on preparing a DD Form 254 can be found in this Part of the Guide.

13. Transportation Requirements. A statement giving shipping instructions is needed if there are deliverables other than data. If there are no shipping requirements, a statement to this effect should be included in the transmittal memorandum.

14. Contract Data Requirements List (CDRL). As required. DD Form 1423 lists the data required including delivery dates and address. DoD 5010.12-M gives full instructions for preparation. (A sample form is shown in Part 10 of this Guide.)

15. Data Item Descriptions (DIDS). As required. This document (DD Form 1664) describes the format and style of the deliverable. For instance, a training manual must conform to specific page layouts, numbering, etc. The Army Library in the Pentagon has all required information in the Military Documents Section. . (A sample form is shown in Part 10, of this Guide.)

As required, add appropriate documentation for the following:

16. Director of Information Management (DOIM) Approval. Contact your agency DOIM Office for guidance.

17. Information Technology (IT) and National Security System (NSS) IT Acquisition Oversight Policy. New guidance prevails as a result of implementation of the Information Technology Management Reform Act (ITMRA) of 1996, P. L. 104-106, as directed by the Executive Order signed July 16, 1996. Information contained at Part 5, of this Guide.

HOW TO WRITE A STATEMENT OF WORK

1. General. The Statement of Work (SOW) provides a clear and concise statement of contract requirements. It should include objectives desired or performance required and avoid specifying the means to accomplish the task. The Government can impose limits on methods, standards, resources, etc. and so state in the SOW; however, the SOW should address the results expected by time limit but not the methods to accomplish the task.

2. Purpose of the SOW. The SOW establishes overall requirements and results required. A properly written SOW establishes tasks and identifies each task's work effort to be performed by the contractor. It is important to clearly identify the customer base and contract performance tasks, especially in requirements contracts. Care and skill exercised in the preparation of the SOW will result in a baseline for proposal evaluation. After contractor selection and contract award, the SOW becomes the standard by which the contractor's performance is measured.

3. Planning the SOW. The first step is to completely understand what is needed. Time should be spent to understand the nature of the problem, proposed solution and history of actions taken in the past. Ask questions, construct a literature review and call offices that you believe have faced similar problems. The following steps are helpful:

- a. Divide the subject matter to be covered into logical component parts.
- b. Develop an outline of how the subject will be covered.
- c. Identify potential cost drivers and ensure that only those necessary for mission operation are included and that they are reduced to the minimal needs
- d. Identify the required tasks that are already defined in commercial, military, or federal specifications and standards. Clearly specify only that portion of the referenced document required to provide the minimal needs of the tasks. Provide the appropriate reference by paragraph.
- e. Identify those functions of the work that will require special care in presentation in the SOW.
- f. Prepare a list indicating primary tasks and any optional tasks.
- g. Determine the GFE/GFP/GFI that will be provided to the contractor for the performance of the SOW.
- h. Assemble copies of all technical documents related to the proposed effort. If the effort will be classified or will require access to classified material, a copy of the appropriate Security Classification Guide should be obtained.

4. Writing the SOW.

a. Language. The language used throughout the SOW is important. Technical language , if needed, should be thoroughly explained. Ambiguous wording that allows more than one interpretation should be avoided. Mandatory provisions should be clearly separable from those that are desirable or optional. Acronyms should be spelled out the first time and explained. Avoid jargon and slang terms. Here are a few specific guidelines:

(1) Write in the active voice using the term "shall," for example, "the contractor shall provide..." instead of "... will be provided by the contractor."

(2) The term "will" expresses a declaration of purpose or to indicate a simple futurity, e.g., "the Government will require 15 working days to review the plan."

(3) The term "should" expresses desirable items and "may" indicates options to the contractor and is non binding in nature..

(4) Avoid the terms "as required," "TBA," "as applicable," "as necessary," and "and/or," as much as possible as they denote an undefined work condition.

(5) Do not use "as directed". This is an indication of a personal services relationship which is generally precluded by law.

(6) Avoid adjectives such as many, most, simple, high volume, etc. Use quantitative information to classify the current state and the required end-state.

(7) Use the phrase "as a minimum" instead of the more vague "including, but not limited to..."

(8) The SOW sets out the need to be addressed, work to be done, deliverables and the standard for acceptable completion of the task, for example, "establish a document tracking system so that each document is accounted for..." To help in SOW preparation, a list of common "work-words" and "product words" are at the end of this segment.

b. Title Page and Table of Contents. The title page contains the name of the project, organization requesting the work, and the POC with address and phone number. Use a Table of Contents if the SOW exceeds five pages. A typical SOW Table of Contents would be as follows.

<u>Title</u>	<u>Page</u>
• Scope.	1
• Background.	1
• Objective	2
• Applicable Documents	3
• Specific tasks	5

• Deliverables	9
• Proprietary Information Statement	10
• Special Considerations	11

c. **Scope.** The Scope section of a SOW will normally consist of two subsets: Background and Objective. The Background acquaints the reader with the problem being addressed. The Objective addresses the solution to be developed under the SOW.

(1) **Background.** This section gives any information about the current or past situations that would influence the work to be done. Be as quantitative and precise as possible.

(2) **Objective.** This paragraph or two describes the Government requirement that the contract will resolve. These are not the specific tasks to be completed.

d. **Applicable Documents.** Many times there are specific documents which will be applicable and should be brought to the attention of any potential contractor. This does not mean that the Government should refer to 15 field manuals and 20 regulations in the chance that they may apply. If a reference is used, the specific section should be identified.

e. **Specific Tasks.** In this section, write what needs to be done using functional terms. Consider how the results of the task can be established as deliverables and measured. A properly written task specifies what is required, not how it should be accomplished.

(1) The specific tasks define the work effort to be performed by the contractor. The individual tasks should be arranged in a systematic and logical sequence. tasks that can be performed simultaneously should be identified, and tasks that must be performed serially should be arranged sequentially in the order they will be worked. Whenever possible, tasks should be grouped in phases to permit Government review of the effort's progress and technical redirection or option selected, especially if contract options are involved..

(2) In this section, address the period of performance of the contract. Potential schedule adjustments should be made.

(3) The SOW should address any special requirements for consideration and preparation. Are the contractors going to need Building Passes? Will the contractors need to have access to the buildings during non-duty hours? Will they need computer network access?

(4) The SOW also addresses any options to be included in the contract. Describe what driving factors will determine whether these are exercised; for example, upon completion and acceptance of the previous task?

f. **Deliverables.** In this section the SOW lays out very specifically what is to be delivered, completed, demonstrated, documented, etc. by specific date. Quantitative descriptions and

product words as shown in Enclosure 2 should be used. If an In-Process-Review (IPR) is desired, it should be included in the list of deliverables. Continuing our example:

Deliverables:

(1) A monthly oral IPR report will be presented to the COR no later than the 5th day of each month.

(2) A Program Plan is due 120 days from contract award date. The Government will take 15 days to review the report.

(3) Approval of the plan from the requesting agency will be presented to the COR 180 days from contract award date.

(4) A report summarizing research accomplished, lessons learned, accomplishments, recommendations and recurring operating actions required by the Government within 30 days of contract completion.

g. Proprietary Information Statement. Often there is proprietary information involved from the Government and/or the Contractor. State how rights to any patents or copyrights which come out of the contract work will be handled. If the Government supplies proprietary information, the contractor must sign a statement regarding its use and promulgation. If the contract supplies Commercial-Off-the-Shelf (COTS) software the Government will obtain ownership. Care should be used in allowing proprietary software as the Government could be locking itself into this contractor.

h. Special Considerations. This is the opportunity of the writer to give instructions to the contractor regarding work to be performed or opportunities which do not directly relate to the individual technical tasks in Section 3. This includes information on technology transfer efforts, assessments regarding the safety aspects, and incentive programs for cost savings.

5. Checking the SOW. Here are a few points to look for:

a. Is the SOW specific enough to permit a realistic cost? Can potential contractors determine the level of expertise, manpower, and other resources needed to accomplish the tasks?

b. Are tasks clearly stated? Can the COR tell whether the contractor has complied with the SOW before signing the acceptance reports?

c. Are sentences written so there is no question as to whether the contractor is obligated, e.g. "the contractor shall" and not "this work will be required?"

d. Are applicable documents referenced? Is each really pertinent to the task? Are the specific relevant sections delineated?

e. Are paragraph headings meaningful and subheadings comparable? Is the text compatible with the title? Are the work tasks presented in a logical and chronological order - first things first and last things last?

f. Are task requirements written in the active voice using "work words" and deliverables in "product words."

6. Final Thoughts on the SOW. Once a SOW is in draft, obtain an outside person to perform a review to provide specific comments and changes.

NOTE: Additional SOW guidance may be found by consulting MIL-HDBK-245C, Preparation of Statement of Work (SOW), dated 10 Sep 1991. If additional assistance is needed, contact the DSS-W Policy and Compliance Branch (703) 693-1345/46, or the contracting officer (if known).

WORK WORDS

Conveying the precise thought in the established work tasks and resultant products is a challenge. The following work words are not exhaustive but should provide help in the developing your SOW:

WORD

analyze
annotate
ascertain
attend
audit
build
calculate
consider
construct
control
contribute
compare
create
determine
differentiate
develop
define
design
evolve
examine
explore
extract
erect
establish
estimate
evaluate
fabricate
form
formulate
generate
install
inspect
institute
interpret
inquire
integrate

MEANING

examine; investigate; study
provide with comments
find out with certainty
be present at
officially examine
make by putting together
find out by computation
think about; to decide
put together; build
direct; regulate
give along with others
find out likeness or difference
cause to be; make
resolve; settle; decide
make a distinction between
bring into being or activity
make clear; settle the limits
perform an original act
develop gradually; work out
look at closely; test quality of
examine for discovery
take out; deduce; select
put together; set upright
set up; settle; prove beyond dispute
approximate an opinion of
find or fix the value of
build; manufacture; invent
give shape to; establish
to put together and express
produce; cause to be
place; put into position
examine carefully or officially
set up; establish; begin
explain the meaning of
ask; make a search of
to add parts to make whole

investigate	search into; examine closely
judge	decide; form an estimate of
make	cause to come into being
manufacture	fabricate from raw materials
notice	comment upon; review
observe	inspect; watch
originate	initiate; to give rise to
organize	integrate; arrange in a coherent unit
perform	carry out; accomplish
plan	devise a scheme for doing; arranging
	activities to achieve objectives
probe	investigate thoroughly
produce	give rise to
pursue	seek; obtain, accomplish
resolve	reduce by analysis; clear up
record	account; journal; chronicle
recommend	advise
review	inspection; examination
study	carefully examine
seek	try to discover
search	examine to find something
solve	find an answer
track	observe or plot the path of

PRODUCT WORDS

Contracts result in deliverables which can be for completed action(s), performance against standards, results against standards, documents, etc. The following are a list of common product words used in SOWs:

- alternatives
- annotations
- books
- certificates
- comments
- data in specified format
- charts
- checklists
- cost estimates
- documentation
- drafts
- drawings
- equipment
- expert testimony
- files
- findings
- guides
- handbooks
- hardware
- illustrations
- lists
- manuals
- milestone charts
- opinions
- plans
- procedures
- publications
- recommendations
- records
- reports
- requests
- slides
- specifications
- standards
- systems
- training materials

THE EXECUTIVE SUMMARY

An executive summary is required for all acquisitions in excess of the Simplified Acquisition Threshold. It summarizes on one page what the acquisition is all about and describes the agency recommendations. The executive summary allows the contracting officer to see the highlights of the acquisition at a glance, and is generally used as the basis for development of the Commerce Business Daily (CBD) announcement, when required. An ideal summary should consist of three paragraphs (the idea is to be brief), each devoted to one of the three parts of the report: introduction, background (findings), and work to be performed. Another type of executive summary basically just describes the requirement. Samples of both types are shown on the following pages.

Any questions should be referred to your Contracting Officer or Contract Specialist.

SAMPLE 1. EXECUTIVE SUMMARY

Introduction. The Pentagon Library has a continuing requirement for a software maintenance contract on the Integrated Library System (ILS). This maintenance assures continuing functionality of the ILS system in support of the mission of the Library.

2. Background. In the late 70's, it was determined that an automated, integrated library system would be developed for the Pentagon Library. The system was developed, installed, and incorporated into most aspects of the library processes. Since that time, the system has been enhanced, expanded, and in the last few years, completely redesigned to take into effect the newer technologies. The present version of the system is state-of-the-art and totally integrated into the many and varied aspects of the library functions, serving both patrons and staff.

3. Work to be Performed. The objective of this contract is to provide the Pentagon Library with continued software maintenance support of the ILS, to assure the software will interface with the peripheral hardware associated with the system, and to prevent "down" time during the hours the Library is open to the public.

(Signature)
(Directorate and Agency Name)

SAMPLE 2. EXECUTIVE SUMMARY

TECHNICAL SUPPORT SERVICES. The Defense Supply Service-Washington, on behalf of the US Army Office of the Deputy Chief of Staff for Operations and Plans, intends to negotiate a requirements contract to provide technical support for the Metaphor Computer System which includes 1) database admin and maintenance. Included in this are: data conversion, file manipulation, report preparation w/graphics derived from combinations of data files; 2) Prototype system development and user support during the life of a system, e.g., development of reporting capabilities, special analysis. Systems will be designed to facilitate queries from the Metaphor Computer System; 3) System admin assistance and operational support includes maintaining and executing backup procedures, troubleshooting hardware, software and system problems; 4) Database admin includes design and creation of databases for the Metaphor Computer System and the Sybase database management system, monitoring of database performance, error logs and ensure validation of database, transferring formatting, loading and off-loading data; 5) Training - establish a training program for users and database administrators of the Metaphor Computer System. The offeror must have a staff that has substantial Army functional experience, as well as at least three years experience in database management using the Metaphor Computer System, and at least a year of Sybase database management experience. Documentation of the offeror's requisite experience must be provided to the Contracting Officer. The length of the contract is one base year with four option years. This requirement is a total small business set-aside(SBSA). Requests shall be in writing; no telephone calls will be accepted. Release of RFP o/a TBD.

Format for a Justification Review Document for Other Than Full and Open Competition.

CONTROL NO:

JUSTIFICATION REVIEW DOCUMENT FOR OTHER THAN FULL AND OPEN COMPETITION

Program/Equipment:

Authority:

Amount:

Prepared by:

Typed Name:

DSN:

Title:

Date:

Procuring Contracting Officer:

Typed Name:

DSN:

Date Reviewed:

Technical Representative:

Typed Name:

DSN:

Title:

Date Reviewed:

Requirements Representative:

Typed Name:

DSN:

Title:

Date Reviewed:

REVIEWS: I have reviewed this justification and find it adequate to support other than full and open competition.

Program Manager (1)

Typed Name:

DSN:

Signature: _____

Date:

Legal Counsel

Typed Name:

DSN:

Signature: _____

Date:

CONTROL NO:

Principal Assistant Responsible for Contracting

Typed Name:

DSN:

Signature: _____

Date:

Competition Advocate (2)

Typed Name:

DSN:

Signature: _____

Date:

(1) Add PEO signature block when item is PEO managed.

(2) For non-PEO items managed by the Army Materiel Command, add AMC Competition Advocate.

Format for a Justification and Approval for Other Than Full and Open Competition.

CONTROL NO:

JUSTIFICATION AND APPROVAL FOR OTHER THAN FULL AND OPEN COMPETITION

- 1. Contracting Activity:** Specify the contracting activity responsible for this action.
- 2. Description of Action:** State whether approval is being requested for a new contract or a modification. Include type of contract, type of funds to be used (R&D, OPA, OMA) and, when applicable, the estimated share and ceiling arrangements.
- 3. Description of Supplies/Services:** Describe the supplies/services. Include the estimated total value, including options, if any.
- 4. Authority Cited:** Identify the statutory authority permitting other than full and open competition, followed by the FAR citation and FAR citation title.
- 5. Reason for Authority Cited:** Describe how this action requires the use of the authority cited. If applicable, identify the proposed or potential contractor(s), and include a discussion of the proposed contractor's unique qualifications for fulfilling the contract requirements. If the authority is FAR 6.302-1, include the required delivery schedule and lead-time involved. If the authority is FAR 6.302-2, include the required delivery schedule and lead-time involved as well as a discussion of the serious injury to the Government which would result if award of a contract is delayed.
- 6. Efforts to Obtain Competition:** Describe efforts to ensure that offers are solicited from as many potential sources as is practicable. Also describe the extent of effective competition anticipated for this acquisition.
- 7. Actions to Increase Competition:** There may be instances when it is not possible to compete the current acquisition. Include a statement of the actions taken, or to be taken, to increase competition (e.g., breakout) before any subsequent acquisition of the supplies or services. If the requirement is for a repair part, address whether or not it has been screened under DFARS Appendix E. If it has been screened, provide the Acquisition Method Code (AMC) and Acquisition Method Suffix Code (AMSC). Provide the approximate date the technical data package will be available.
- 8. Market Survey:** Describe the extent and the results of the market survey (FAR 7.101) conducted to identify all qualified sources. If one was not conducted, give the reasons, and attach a copy of the approved waiver.

CONTROL NO:

9. Interested Sources: Before a J&A can be approved, potentially interested offerors must be advised by a synopsis in the Commerce Business Daily (CBD) about the pending acquisition in sufficient detail that interested parties may submit capability statements. Include a listing of the sources that have written to express interest in the acquisition. If applicable, clearly state that "To date, no other sources have written to express an interest." If 10 U.S.C. 2304(c)(1) is the authority cited, explain why other sources were rejected. Also, state that the notices required by FAR 5.201 shall be or have been published, and that any bids or proposals received shall be considered. If a CBD notice will not be published, state which exception in FAR 5.202 applies.

10. Other Facts: Discuss any other facts supporting the use of other than full and open competition, such as the following:

a. Procurement history. Reasonable efforts to retrieve the following items from computer records, contract files, competition advocate office files or other sources are expected:

- (1) Contract numbers and dates of the last several awards.
- (2) Competitive status of these actions.
- (3) Authority previously used for less than full and open competition.
- (4) If a justification was prepared to support the procurement made before this one, a summary of the contents of paragraph 7 of the justification for that procurement and an explanation of the results.
- (5) If any prior award was accomplished by full and open competition, a detailed explanation of the changed circumstances.
- (6) An explanation of any unusual patterns which may be revealed by the history, e.g., several consecutive, urgent buys.
- (7) If a justification was prepared to support the procurement made before this one, briefly describe the circumstances justifying the buy and whether there have been any significant changes.

b. Acquisition data availability. Explain why technical data packages, specifications, engineering descriptions, statements of work or purchase descriptions suitable for full and open competition have not been developed or are not available. Describe actions taken or planned to remedy this situation.

CONTROL NO:

c. Unusual and compelling urgency. When FAR 6.302-2 is cited, provide data, estimated cost or other rationale to explain the nature and extent of the injury to the Government. If the delay associated with the requirement for first article testing is the principal reason for not awarding the contract on a full and open basis, clearly describe the reasons that first article testing is required on this procurement and why other means of assuring quality are not being used.

d. Subcontracting competition. In single source situations, address efforts to be taken by the Government to assure that the prime contractor obtains as much competition as possible in its subcontracting.

11. Technical Certification: Include the following statement:

I certify that the supporting data under my cognizance which are included in the justification are accurate and complete to the best of my knowledge and belief.

Typed Name:

Date:

Title:

Signature:

12. Requirements Certification: Include the following statement:

I certify that the supporting data under my cognizance which are included in the justification are accurate and complete to the best of my knowledge and belief.

Typed Name:

Date:

Title:

Signature:

13. Fair and Reasonable Cost Determination: Include the following determination:

I hereby determine that the anticipated cost to the Government for this contract action will be fair and reasonable.

Provide the basis for this determination (e.g., describe techniques to be used to determine fair and reasonable price, such as cost analysis, price analysis, audit, should cost, independent Government estimate, etc.).

Typed Name:

Date:

Title:

Signature:

CONTROL NO:

14. Procuring Contracting Officer Certification: This certification shall be made by the contracting officer who will sign the contract resulting from this justification and approval. Include the following statement:

I certify that this justification is accurate and complete to the best of my knowledge and belief.

Typed Name:

Date:

Title:

Signature:

APPROVAL

Based on the foregoing justification, I hereby approve the procurement of (state equipment/ services being procured) on an other than full and open competition basis pursuant to the authority of 10 U. S. C. 2304 (c) (1), subject to availability of funds, and provided that the services and property herein describe have otherwise been authorized for acquisition.

Name: _____

Date: _____

Position/Title: _____

Signature: _____

ACQUISITION PLANNING (AP)

Acquisition planning involves projecting your requirements for the forthcoming fiscal year and then estimating when those requirements will be acquired. The DSS-W has been asking its major customers, on an annual basis, to list their requirements for the forthcoming fiscal year on a quarterly basis, to break the requirements down for over and under the Simplified Acquisition Threshold, and then to break out requirements by competitive or sole source. This assists both our customer and the DSS-W in planning resources to meet the customer's needs. If an agency is not contacted by the DSS-W to furnish data in support of acquisition planning, it would still be beneficial to do so.

Market surveys are the responsibility of program managers or the requiring activity. |

Acquisition plans are specific for a particular acquisition and are required for Research and Development, production, supply or service acquisitions over \$30 million for all years and base support service acquisitions over \$5 million for any one year or \$15 million for all years. When feasible, AP's will be written on a program/project basis, covering all procurement actions above this threshold, for up to a five year period. In accordance with AFARS 7.103 Program Executive Officers (PEOs) and Project Managers (PMs) reporting to DA, shall approve APs for programs/projects assigned to them. The Principal Assistant Responsible for Contracting (PARC) shall approve APs for all non-PEO procurements.

The plan shall address all technical, business, management , and other significant considerations that will control the acquisition. The specific content of plans can, and will, vary, depending on the nature, circumstances, and stage of the acquisition. The plan can and should be prepared prior to submission of the acquisition to the DSS-W. While the bulk of the information must be prepared by the customer, there may be some contracting specific information which can be provided by the DSS-W. All requirements above the Simplified Acquisition Threshold should have some type of business plan, though it need not be the level of detail required by an AP.

If there are questions concerning document preparation, or additional information is needed, agencies should contact their contracting personnel who will be their support.

The AP **must** be marked **FOR OFFICIAL USE ONLY - PROCUREMENT SENSITIVE**. Attached is a format of an Acquisition Plan showing those items which must be considered.

FOR OFFICIAL USE ONLY - PROCUREMENT SENSITIVE

ACQUISITION PLAN

PROJECT MANAGER OFFICE: _____

PROGRAM: _____

PROJECT MANAGER: _____

DESCRIPTION:

APPROVALS (Typed Name and Signatures):

Project Manager _____ Date _____

Contracting Officer _____ Date _____

Attorney Advisor _____ Date _____

Small and Disadvantaged
Business Utilization officer _____ Date _____

Special Advocate
For Competition _____ Date _____

Deputy Director For
Acquisition _____ Date _____

Principal Assistant
Responsible for Contracting _____ Date _____

Head Of Contracting
Activity _____ Date _____

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FOR OFFICIAL USE ONLY - PROCUREMENT SENSITIVE

ACQUISITION PLAN NO. _____

Initial Plan _____

Change No. _____

Program/Project _____

Program/Project Manager _____

Acquisition Agency/Office _____

Summary Of Program/Project, System, Service, Etc.:

Authentication:

Acquisition Office Representative _____

Date _____

Program/Project Manager _____

Date _____

FOR OFFICIAL USE ONLY - PROCUREMENT SENSITIVE
FOR OFFICIAL USE ONLY - PROCUREMENT SENSITIVE

1. Acquisition Background and Objectives:

a. **Statement of Need.** Introduce the plan by a brief statement of need. Summarize the technical and contractual history of the acquisition. Discuss feasible acquisition alternatives and any related in-house effort.

b. **Applicable Conditions.** State all significant conditions affecting the acquisition, such as (i) requirements for compatibility with existing or future systems or programs, and (ii) any known constraints on cost schedule, and compatibility of performance.

c. **Cost.** Set forth the established cost goals for the acquisition and the rationale supporting them, and discuss related cost concepts to be employed, including, as appropriate, the following items:

(1) **Life Cycle Cost.** Discuss how life-cycle cost will be considered. If it is not used, explain why. If appropriate, discuss the cost model used to develop life-cycle cost estimates.

(2) **Design-to-Cost.** Describe the design-to-cost objective(s) and underlying assumptions, including the rationale for quantity, learning-curve, and economic adjustment factors. Describe how objectives are to be applied, tracked, and enforced. Indicate specific related solicitation and contractual requirements to be imposed.

d. **Capability or Performance.** Specify the required capabilities for performance characteristics of the supplies or services being acquired and state how they relate to the need.

e. **Delivery or Performance Period Requirement.** Describe the basis for establishing delivery or performance period requirements. Explain and provide reasons for any urgency if it results in concurrence of development and production or constitutes justification for not providing for full and open competition.

f. **Trade-Off.** Discuss the expected consequences of trade-offs among the various cost, capability performance, and schedule goals.

g. **Risks.** Discuss technical, cost, and schedule risks and describe what efforts are planned or under way to reduce risk and the consequences of failure to achieve goals. If concurrence of development and production is planned, discuss its effects on cost and schedule risks.

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FOR OFFICIAL USE ONLY - PROCUREMENT SENSITIVE

2. Plan of Action:

a. Sources. Indicate the prospective sources of supplies and/or services that can meet the need. Consider required sources of supplies and services. Include consideration of small business, small disadvantaged business, and labor surplus area concerns. If the acquisition or a part of it is for commercial or commercial-type products, address the results of market research and analysis and indicate their impact on the various elements of the plan. If the acquisition or part of it is for other than commercial or commercial-type products, address the extent and results of the market survey conducted or the reasons one was not or will not be conducted.

b. Competition. If full and open competition is not contemplated, cite the authority in FAR 6.302, discuss the basis for the application of that authority, identify the source(s), and discuss why full and open competition cannot be obtained. (NOTE: A Justification and Approval for Other Than Full and Open Competition (J&A) would be required in this instance. See J&A format , pages ____ in this Guide.)

c. Source Selection Procedures. Discuss the source-selection procedures for the acquisition, including the timing for submission and evaluation of proposals and the relationship of evaluation factors to the attainment of the acquisition objectives.

d. Contracting Considerations. For each contract contemplated, discuss contract type selection; use of multi-year contracting, options or other special contracting methods; any special clauses, special solicitation provisions, or FAR deviations required; whether sealed bidding or negotiation will be used and why; whether equipment will be acquired by lease or purchase and why; and, any other contracting considerations.

e. Budgeting and Funding. Describe how budget estimates were derived and discuss the schedule for obtaining adequate funds at the time when they are required.

f. Product Descriptions. Explain the choice of product description types to be used in the acquisition.

g. Contractor Versus Government Performance. Address the consideration given to OMB Circular No. A-76.

h. Management Information Requirements. Discuss, as appropriate, what management system will be used by the Government to monitor the contractor's effort.

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i. Logistic Consideration. Describe --

(1) The assumptions determining contractor or agency support, both initially and over the life of the acquisition, including consideration of contractor or agency maintenance and servicing and distribution of commercial products;

(2) The reliability, maintainability, and quality assurance requirements, including any planned use of warranties;

(3) The requirements for contractor data (including repurchase data) and data rights, their estimated cost, and the use to be made of the data; and

(4) Standardization concepts, including the necessity to designate, in accordance with agency procedures, technical equipment as "standard" so that future purchases of the equipment can be made from the same manufacturing source.

(j) Government Furnished Property. Indicate any property to be furnished to contractors, including material and facilities, and discuss any associated considerations, such as its availability or the schedule for its acquisition.

(k) Government Furnished Information. Discuss any Government information, such as manuals, drawings, and test data, to be provided to prospective offerors and contractors.

(l) Environmental Considerations. Discuss environmental issues associated with the acquisition, the applicability of an environmental assessment or environmental impact statement the proposed resolution of environmental issues, and any environment-related requirements to be included in solicitations and contracts.

(m) Security Considerations. For acquisitions dealing with classified matters, discuss how adequate security will be established, maintained, and monitored.

(n) Other Considerations. Discuss, as applicable, energy conservation measures, standardization concepts, the industrial readiness program, the Defense Production Act, the Occupational Safety and Health Act, foreign sales implications, and any other matters germane to the plan not covered elsewhere.

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(o) **Milestones for the Acquisition Cycle.** As required, address the following steps and any others that may be appropriate:

- Acquisition Plan approval
- Statement of Work
- Specifications
- Data requirements
- Completion of acquisition package preparation
- Purchase request
- Justification and Approval for Other Than Full and Open Competition, where applicable, and/or any required Determination and Finding (D&F) approval
- Issuance of synopsis
- Issuance of solicitation
- Technical evaluation of proposals
- DCAA audits, field reports
- Beginning and completion of negotiations
- Contract preparation, review, and clearance(s)
- Contract award
-

(p) **Identification of Participants in Acquisition Plan Preparation.** List all individuals who participated in preparation of the acquisition plan, giving contact information for each.

**FOR OFFICIAL USE ONLY - PROCUREMENT SENSITIVE
INSTRUCTIONS FOR PREPARATION OF AN**

INDEPENDENT GOVERNMENT ESTIMATE (IGE)

1. Introduction.

An Independent Government Estimate (IGE) must be prepared for every new acquisition which exceeds the simplified acquisition threshold. It is a useful tool, when properly prepared, to assist the contracting officer in determining a fair and reasonable price. A secondary purpose of a well prepared IGE would be to assist the contracting officer in conducting a “cost realism analysis” which is required on all cost reimbursement contracts and is a quantitative assessment of what the project will likely cost, as compared to what the offeror states it will cost. While preparation of an IGE is the responsibility of the requiring activity, DSS-W will be able to answer any questions you may have, though it is hoped that after reviewing this section, most potential questions will be answered.

2. General.

a. Although IGE documentation is a part of the government procurement cycle, there is no detailed guidance on how to prepare an IGE in the Federal Acquisition Regulation (FAR).

b. Development of an IGE should bear a close relationship to the program being managed. The IGE should be independently prepared and not prepared with the assistance of the contractor.

c. In order to prepare a reliable IGE, one should possess knowledge of the product or service being purchased, a comprehensive knowledge of the statement of work/scope of work, as well as quantitative techniques to accommodate the fluctuating economy.

d. When buying a commercial item with stable specifications, the estimator when preparing an IGE should research past price history and make adjustments for any change in specifications, changes in quantities and inflation factors. For items which do not have a detailed pricing history it is necessary to do a detailed analysis of individual cost elements. The detailed guidance on how to prepare an IGE assumes that there has been no detailed pricing history and therefore individual elements must be broken down.

3. Format for developing an IGE. When costs must be broken down to develop an estimate, the IGE should include the following elements, Direct Cost, Indirect cost and Profit/Fee. Direct cost and indirect cost can each be composed of several sub-elements. A sample sheet for development of an IGE is included at the end of this section.

a. Cost Elements. The main cost elements of IGE that are most frequently applied within DSS-W are:

(1) Direct Labor - Each labor category required should be listed including hours, rates, and extended amounts for each. Then total labor expense should be aggregated.

(2) **Labor burden (Fringe benefit)** - This cost is accumulated in indirect cost pools, however; sometimes it is treated as direct cost. In any event, it is used as a percentage of direct labor expense. Typically this would run around 30%. It includes elements such as payroll records, FICA, workmen's compensation, employee benefits, health and welfare, and vacation and holidays.

(3) **Overhead** - This is an indirect rate as sub-elements contained within this category cannot be applied to a specific cost objective. Included here are such expenses as utility expense, rent expense, indirect supplies, property taxes, and depreciation. This is expressed as a percentage of the aggregate cost of direct labor and labor burden. Typically this would run between 60-80%.

(4) **Other Direct Cost (ODC)** - Generally these costs can be charged directly against a specific contract. Examples are materials, equipment, travel and per diem, training, and printing/graphics.

(5) **Transportation:** If this cost is not identifiable with specified contract/cost objective or expressed in percentage (insignificant) it is treated as an indirect cost.

(6) **General and Administrative expense (G&A)** - This includes expenses of a company's general and executive offices, and the cost of such staff services as legal, public relations, and financial. It is expressed as a percentage of the aggregate of one through 7 above. Typical G&A rates range between 10-20%.

(7) **Profit/FEE.**

(8) **TOTAL PRICE:** (1)+(2)+(3)+(4)+(5)+(6)

b. Methodologies. The following tools can be used when developing an IGE. At times, the estimator will be able to develop an estimate without having to break down individual cost elements, but in other circumstances where historical bottom line pricing data is absent, a breakdown as discussed above will be necessary.

(1) **Historical Data:** The IGE and the cost/price structure of an existing contract or similar service contract could be used as a reference. When multiple years are being planned, this should be escalated.

(2) **Analysis and Comparison:** Analysis and comparison with current prices paid for similar work.

(3) **Market Survey:** Conduct a market survey (A word of caution: Conducting the market survey must be done carefully, keeping in mind in this competitive procurement arena, no sensitive information may be divulged to potential vendors.)

(4) Catalog price.

(5) Statistics. Department of Labor statistics, past or current information on how the contractor accounts for its cost.

c. Escalation Methodologies.

(1) General. Escalation techniques are used frequently in preparation of an IGE as well as conducting a cost and price analysis for base year and option year(s).

(2) Base Year. If you have a unit cost data that is not current, escalate to bring it up to a current value. (Further discussion of escalation factor follows.)

(3) Option year(s):

(a) To forecast the option year(s) cost, appropriate escalation factors are applied to the previous cost element to bring it up to specified year value.

(b) If the contract performance involves more than one year, two different escalation factors should be applied as appropriate. The following methodologies are used as appropriate:

(i) The escalation application for option years maybe based on Data Resources Incorporate (DRI) economic forecast index. Make sure the escalation rate being applied is current since the DRI index is updated quarterly. For example, assume that -

Base Year (1996) Labor rate \$30.00 Escalation Factor for 1997 is 3.5% (.035)

1996

\$30.00

1997

\$30.00 x 1.035 = \$31.05

(ii) The indirect rates fluctuate from year to year (some companies update monthly depending on company's activities).

(iii) Escalation Rates. The current DRI Professional & Technical Workers (in %) escalation indices as of 17 October 1996 are as follows:

<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>
3.5	3.1	3.3	3.4	3.5	3.5	3.7	3.9

(iv) Average Hourly Earnings - Computer, Data Processing Services:

<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>
4.4	4.0	3.9	4.1	4.3	4.1	4.0	4.0

(c) If the contract option year crosses two years (1 September 1997 thru 31 August 1998) you may apply following methodologies:

$$\begin{array}{lcl} \text{(i)} & \text{DRI} & \text{1997 } (3.5\%/12 = .2917 \times 4 = 1.167\%) \\ & & \text{1998 } (3.1\%/12 = .258 \times 8 = 2.064\%) \\ & & 1.167\% + 2.064\% = 3.23\% \end{array}$$

or

$$\text{(ii)} \quad 3.5\% + 3.1\% = 6.6\% \text{ divide by } 2 = 3.3\%$$

(d) Escalation Rate for Subsequent Option Years. A similar methodology is used to obtain an escalation rate for subsequent option years applying appropriate DRI economic index factor. You may also wish to consider the following:

(i) Reference the Fringe Benefit factor applied in current contract.

(ii) Conduct a market survey on contractors who are currently performing similar work and apply composite rates.

(iii) Apply an average rate.

4. Signatures. The IGE should include a signature of the individual preparing the estimate. For your own protection, you may want to have a reviewing official examine this document and concur with it.

5. Sample Format. A sample format for preparing an IGE follows:

5. Other Direct Costs

Other Direct Costs \$ _____

6. Total Direct and Overhead Costs \$ _____

7. Indirect Costs.

8. Total Costs (Direct & Indirect) \$ _____

9. General & Administrative (G&A) \$ _____

10. Total Cost (including G&A) \$ _____

11. Profit/Fee (Percentage Factor & Dollars) % _____ \$ _____

12. TOTAL ESTIMATED COST \$ _____

13. Applicable Period: FROM: _____ **TO:** _____

14. Reliability _____

TYPED NAME AND SIGNATURE **DATE**

PREPARING OFFICIAL **DATE**

REVIEWING OFFICIAL **DATE**

APPROVING OFFICIAL **DATE**

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FOR OFFICIAL USE ONLY - PROCUREMENT SENSITIVE

INDEPENDENT GOVERNMENT ESTIMATE SUPPORTING DOCUMENTATION

Preparation Instructions:

Assumptions Used: Identify any and all assumptions and methodologies used in cost computations.

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.

Basis for Cost Estimates: Specify the item, the basis for the factor used and the source of the data used in preparing the IGE.

ITEM

BASIS

SOURCES

- 1.
- 2.
- 3.

Additional Project Information: Identify any other information which may be necessary or helpful in the proper evaluation of the cost estimates. Include any Statements of Work (SOW) or previous Baseline Cost Estimates (BCE).

PREPARATION OF THE DD FORM 254

CONTRACT SECURITY CLASSIFICATION SPECIFICATION

The following is guidance on the use and preparation of the DD Form 254 "Contract Security Classification Specification" from the Defense Investigative Service (DIS). The DD Form 254 specifies the requirements and responsibilities related to classified acquisitions by a User Agency in connection with prime contractors requiring access to national security information.

1. Definitions:

(a) **Classified Contract** - means any contract that requires, or will require, access to classified information (CONFIDENTIAL, SECRET, or TOP SECRET) by the contractor or its employees in the performance of the contract. A contract may be a classified contract even though the contract document is not classified.

(b) **Classified Information** - means any information or material that is owned by, produced by or for, or under the control of the United States Government, and determined pursuant to Executive Order 12356, or prior orders to require protection against unauthorized disclosure, and is so designated.

2. Classified Acquisition Steps (Prime Contract):

a. **Security.** Early in the acquisition cycle, certain security requirements must be considered. Will access to classified information be involved? Will access be required during the pre-award phase, or will it only be required for actual performance of the contract? Are all the prospective contractors cleared to the appropriate level, and are they equipped to properly safeguard the classified information involved? The answers to these questions and the timeliness of your action will have a significant impact on your acquisition and the Defense Industrial Security Program (DISP).

b. **Lead Time.** As a requiring activity, you should provide enough lead time in your acquisition cycle to accomplish the security actions that may be needed. In many instances, advanced planning can ensure that the bid package will not require access to classified information, and prevent processing an entire bidder list for facility security clearances. When access is required in the pre-award phase, an interim facility security clearance may be the solution. If access is not a factor in the pre-award phase, but will be required for contract performance, only the successful bidder need be processed for a facility clearance. Processing unnecessary prospective contractors for facility clearance is very time consuming and costly and greatly increases the time it takes to process that one contractor who actually has a need for a clearance. The following steps are provided to assist in the security actions required for a classified acquisition:

- (1) Determine the security requirements for the proposed contract.

- **Access to classified information will be required.** This is a "classified contract" within the meaning of the Industrial Security Program. Certain security clauses must be incorporated in the solicitation and the contract (see Subpart 4.4 of the Federal Acquisition Regulation (FAR)) and certain security clearances will be required.

- **Access will not be required in the pre-award phase.** Prospective contractors do not have to possess facility security clearances to bid on the solicitation. The successful bidder must have an appropriate facility security clearance, and/or safeguarding capability, if required.

- **Access will be required during the pre-award phase.** All prospective contractors must possess the appropriate facility clearance and safeguarding capability.

(2) Determine current clearance status of all prospective contractors. Contact the appropriate DIS Cognizant Security Office (CSO) for verification of their clearances and safeguarding capability, if required.

- **All prospective contractors have appropriate clearance.** No clearance action needed.

- **Some prospective contractors do not have appropriate clearances.** If pre-award access is required, all prospective contractors must be processed for the clearance prior to release of the information. Contact the CSO and furnish the appropriate information needed to process the clearance. Would an interim clearance be appropriate? Discuss this with the CSO.

(3) **Determine what security classification guidance the contractor will need to perform on the contract.** A "Contract Security Classification Specification" (DD Form 254) is required for each classified contract and must be incorporated in the solicitation and in the contract.

(4) **Detailed guidance, tailored to the specific contract performance, must be prepared.** The Program Manager and/or your Cognizant Security Office should be contacted for appropriate guidance. Even if pre-award access is not required, the DD Form 254 should be incorporated in the solicitation to provide the contractor the information needed for performance. Add the following annotation in Item 11. "Remarks" of the DD Form 254. "Pre-award access is not required. This DD Form 254 reflects the security requirements for the contract when awarded."

(5) **Original DD Form 254.** The DD Form 254, issued with the solicitation (RFQ, RFP, or IFB), is always an "original." When the contract is awarded, the contract number is added to the DD Form 254 and this DD Form 254 is also an "original."

(6) **Distribution.** Distribute the DD Form 254 in accordance with paragraph 7-103, ISR. (The DD Form 254 is a contractual document and must be a part of every classified contract.)

(7) **Review of Security Requirements.** Review the security requirements during the different stages of the acquisition; pre-award, award, research and development, production, etc. Issue a revised DD Form 254 as necessary. Review the security requirements at least biennially (paragraph 7-104, ISR), upon final delivery of goods and services and on termination of the contract.

(8) **Delivery.** On final delivery of goods or services or on completion or termination of the contract, the contractor is required to return to the User Agency all classified material received or generated under the contract, or to destroy all classified material, unless retention is requested and authorized by the Contracting Officer. Retention may be authorized by issuing a FINAL DD Form 254. (Item 14.b on the DD Form 254 would be completed.)

(9) **Recommendations/Changes by Contractor.** Encourage the contractor to provide recommendations and changes to the guidance and to advise you if there are any problems with interpretation or other areas that need any clarification. Always be receptive to any comment or recommendations offered by the contractor.

CONTRACTING OFFICER'S REPRESENTATIVE (COR) DESIGNATION, DUTIES AND RESPONSIBILITIES

1. Contract Administration And Monitoring. This section involves the procedures and responsibilities of the Contracting Officer's Representative (COR) in the Post-Award Process which is also considered Contracts Administration. Contracts Administration is the monitoring of a contract from award thru closeout. Contract Administration is defined as the effort directed towards the necessary administrative controls to ensure that contract execution is achieved in accordance with the Federal Acquisition Regulation (FAR), DoD Supplement, and the terms and conditions of the contract. A contract which contains all of the necessary provisions may not succeed if the contract is poorly administered. To effectively monitor a contract, the Contracting Officer (KO) delegates (after receiving the nomination from the requesting activity) the responsibility for administration to a qualified Contracting Officer's Representative (COR). This delegation is based on DFARS Subpart 201.6, Contracting Authority and Responsibilities, a copy of which is directly after this document.

2. Contracting Officer (KO): A Government KO occupies a unique position in the acquisition process. The KO is the only person with authority to obligate the Government in contractual matters. The KO may obligate the expenditure of funds on a contract and can require the contractor to perform any service or supply a product under contract. The KO is the only person who may change, amend, or modify the contract or take any action to enter into or change a contractual commitment on behalf of the Government. However, just as in the pre-award phase of the acquisition, the KO should coordinate with cognizant technical, auditing, legal, and other personnel in order to administer a contract effectively and protect the rights and best interest of the Government.

3. Administration Responsibilities.

a. Designation: The COR is appointed at the time of award by the KO. The KO may designate any Government employee, Military or Civilian who is a United States citizen, to act as his/her authorized representative in monitoring a contract subject to authority and limitations outlined in the letter of appointment. The KO shall ensure that this particular individual possesses qualifications and experience commensurate with the authority which the individual will exercise. Responsibilities of a COR are discussed in detail in later sections of this chapter.

b. Duties of the COR. The COR is responsible for ensuring the Government meets all of its responsibilities to the contractor and ensuring the contractor performs/delivers IAW the contract. Specific responsibilities of the COR include:

(1) Maintain COR Contract Files. As authorized representatives of the Government the COR's records are a part of the official post award contract file. They shall be forwarded to the KO for retirement with the official contract file IAW current disposition of completed contract files. The content of the COR files is discussed in paragraph 4 below.

(2) Prepare Memorandums for Record (MFR). As a matter of practice, the COR shall prepare MFRs of discussions, meetings, trips, and telephone conversations relating to a contract, whether with contractor personnel or other interested Government personnel. Each MFR, other similar records, and all correspondence relating to the contract shall cite the contract number. A copy of all actions or correspondence shall be furnished to the KO and those interested parties having a need to know. Consideration must be given to restrictions regarding proprietary data, as well as business-sensitive information.

(3) Monitor Technical Compliance. The COR will ensure that the contractor complies with all technical requirements of the specification/SOW either included in or referenced by the contract, including the timely delivery of reports, documentation, maintenance, etc. The COR will:

(a) Ensure schedules/milestones are met, and inform the KO, in writing, of any performance failure by the contractor.

(b) Inform the KO in writing as soon as it is foreseen that the contract will not be completed according to schedule, including recommendations for remedial action.

(c) Ensure the contractor completes the technical requirement of the contract within the specified time. The use of IPR (In Process Review) meetings is a very effective tool to monitor compliance as well as expenditure of funds and hours. Problems and issues should also be discussed at this time. IPRs should be discussed in the SOW and also in the Contract Data Requirements List (CDRL) DD Form 1423, showing where, when, and what information is required from the contractor at/for these meetings.

(d) Ensure the Government meets its contract obligations to the contractor. This includes, but is not limited to, the Government timely furnishing equipment, facilities, and services called for in the contract, and timely Government comment on, or approval of draft/final contract deliverables as may be required.

(e) Receive, inspect and accept or reject each deliverable/service specified in the contract. The evaluation method should be spelled out in Section E of the contract.

(4) Inspection and Acceptance of Contract Deliverables/ Performance. The COR is responsible for determining that work is complete and conforms with the requirements of the contract. Any questions or discrepancies with the contract should be referred to the KO immediately

(a) The COR is also responsible signing formal acceptance documents and invoices. Once formal acceptance has been made, the contractor is excused from correction of unsatisfactory work, except for latent errors or defects.

(b) Requirements placed upon the contractor are spelled out in the SOW; however, method for determining if work is completed, or on-going work is acceptable is spelled out in

Section E of the contract. The COR should provide written notification to the KO when the contract work has been judged complete and technically acceptable.

(c) The acceptance of contractor performance may be documented on either a Material Inspection and Receiving Report (DD Form 250) if required by the contract, a letter of acceptance or the certification of a commercial invoice. The certification of an invoice or DD Form 250 is the most common form of acceptance for lease or supplies. It also serves as an instrument for effecting payment. A sample copy of DD Form 250 is shown in Part 10 of this Guide.

(5) Reports/Monitors Contract Delinquencies. When monitoring a contract there are some danger signals that the COR should be aware of. Due dates missed, bad report content, expenditures out of phase, and personnel constantly being changed, could mean some serious problems. For those cases listed, especially work termed unsatisfactory, the COR, KO and possible Legal Counsel, should determine what appropriate actions (depending on contract type) are required. One of the best ways to monitor deliverables/performance and prevent delinquencies is thru the use of DD Form 1423, Contract Data Requirements List (CDRLs). A sample copy of DD Form 1423 is shown in Part 10 of the Guide. This is represented in the SOW and a copy is included as an Attachment in Section J of the contract. The dates listed in the DD Form 1423 should match any other reference to these dates in the SOW. Thru the use of CDRLs and deliverables such as MFRs or documents showing reasons for course of action taken, the COR has better control/knowledge of the end product.

(6) Monitors Technical Contract Requirements. It may become necessary to provide technical interpretation to the contractor on some portion of the SOW/specification or other documents in which the requirements placed upon the contractor are spelled out. The COR may call upon other technical personnel to assist him/her in determining what the technical requirements are; however, prior to providing guidance to the contractor, the COR must check with the KO and be assured that the contract does indeed bear out that the guidance is accurate. Memo of all technical guidance will be made part of the contract file.

(7) Responsible for Proper Contract Close-Out. These responsibilities are discussed in depth later in this Part.

(8) Monitoring of Contract Funds. A COR must be aware of the current available funding and the contract execution against the existing funding plan to enable and ensure the contract execution and any contract changes and revision procedures are within dollar thresholds and scope or that special/exceptional planning is initiated to support the contract/user requirements when changes occur. The COR will also need to monitor commitments and obligations against the contract.

(9) Other Duties as instructed by the KO. Depending upon any unique circumstances, the KO may assign unique responsibilities for the particular contract the COR is monitoring.

c. Official COR Files. CORs are authorized agents of the Government; therefore, their records are part of the official contract files and must be forwarded to the KO for retirement with the official contract files upon completion of the contract. CORs are required to maintain official records of all actions to which they have been a party regarding the contract that they have been appointed to administer. If the retained copies of contractual documents and correspondence do not reflect all actions taken, suitable MFRs must be prepared promptly and placed in the official file. Details of meetings and phone conversations should be reduced to writing and a copy sent to the other party confirming details of conversations and establishing the formal written record of the event.

d. Content of COR Files. The following documents are required for the effective performance of COR functions and to establish the official COR files:

- (1) Copy of the contract and all modifications.
- (2) Copy of Letter of Appointment and any correspondence from the KO which provides clarification to assigned functions or certain statements of policy. (Example of this letter is shown in this Part).
- (3) Copy of statement indicating that COR has read and understands AR 600-50, or equivalent.
- (4) Copy of records of COR inspections, and progress reports which should be done on regular basis.
- (5) Correspondence to/from the KO and COR and contractor, and also from COR and COTR.
- (6) Memo (or copies) of phone conversations, meetings, discussions of actions taken by the COR or others which relate to the contract.
- (7) Copy of delivery/task orders and modifications , with copies of funding documents and other supporting documentation, e.g., acceptance and evaluation of deliverables.
- (8) Other documents which pertain to the contract.

4 Exercising of Options. This section outlines the procedures and timeframe to follow when exercising the option for an existing contract.

a. The decision to exercise the option on an existing contract for the next contract period will be defined no later than 60 days prior to the expiration of the current contract period.

b. The COR will notify the contracting officer to have an existing contract renewed for the coming FY. Included in this notification for contract renewal will be any changes that need to be

made to the contract (i.e., buyout of lease items, drop specified items from the contract, and/or change the type of contract maintenance coverage, etc.).

c. Each request for contract renewal will be closely reviewed by the KO to determine if the type of maintenance needs to be changed or even canceled and whether buying is more beneficial than leasing.

d. The COR will coordinate contract renewal request with their budget for verification of the availability of funds to support the renewal and completion of the funding document.

e. The acquisition activity will be provided with a request to renew a contract, to include any special request (lease buyouts, change in maintenance, etc.), along with the following documents:

- (1) Funding Document (DD Form 1262) for DSS-W..
- (2) Statement that the options still fulfill an existing Government need and extension of the term of the contract is in the best interest of the Government.
- (3) Reutilization Determination (if applicable).
- (4) Lease versus purchase analysis (if applicable).

5. Contract Modifications. Contract modification is any alteration to a contract, to include new work within scope as well as exercising options of the contract, and the use of engineering change proposals which are treated as new work. Listed below is a checklist that can be used for modification of contracts.

a. New Work (within Scope) Documentation should consist of:

- (1) Cover letter explaining purpose and need of modification.
- (2) Funding Document.
- (3) Specify proper approvals (when applicable).
- (4) Independent Government Estimate (IGE).
- (5) Statement of Work and/or performance specification (revisions or clarifications to the original Statement of Work are acceptable, as in equipment substitutions).

b. New Work (outside Scope) Documentation should consist of:

- (1) Same as above (items 1-5), plus
- (2) Acquisition Approval amended.
- (3) Justification and Approval for Other than Full and Open Competition.

c. Engineering Change Proposals (Government Generated). Documents required are the same documents used for New Work listed above.

NOTE: Additional documents may be necessary depending upon the nature of the work requested. Verify with your contracting officer before submitting documents.

When a modification to the contract is completed, the KO will send the COR a copy of SF Form 30, Amendment of Solicitation/Modification of Contract. (Blank copy of SF 30 is shown in Part 10.)

6. Delinquencies.

a. The COR must thoroughly understand the rights and responsibilities of both the Government and the contractor in delinquency situations so that they will not do anything that might be prejudicial to the Government. Two principles govern conduct in these situations. First, when a delinquency appears imminent, prompt action must be taken to protect the Government's rights. Second, in administering a delinquent contract, the COR will do nothing that might waive the Government's rights. The COR is responsible for notifying the KO when, as a result of monitoring the contractor's progress, it is clear that the contractor may become delinquent or is delinquent.

b. The KO should take formal action by notifying the contractor of their failure to fulfill contract terms if a delinquency does in fact occur. This delinquency notice requires the contractor to submit the causes for their delinquency. Once the contractor has formally replied to the delinquency notice the KO will, with technical and legal counsel where appropriate, evaluate all options and select that which is in the best interest of the Government. One of the following actions may be taken by the KO and will be captured by delivery order/contract modification:

- (1) The contract delivery schedule may be extended, with due consideration.
- (2) The contract may be terminated for default.
- (3) The contract may be terminated on the basis of agreement for a no-cost settlement.
- (4) The Government may choose to forebear with the contractor's delinquency and allow the contractor to continue with deliveries or performance in a delinquent status.

c. If the KO decides to continue the contract, the COR should monitor even more closely the contractor's progress; e.g., more frequent progress meetings and status reports, closer attention to timelines, and reviews of performance and variances. The COR must maintain close coordination with the KO during the remaining period of the contract.

7. Close-Out of the Contract. Upon completion of the work, the COR will forward to the KO the records and documents pertinent to the administration of the contract, which were retained by the COR during the period of contract performance. When it is determined that the contract has been completed, all files (reports, correspondence, etc.) pertaining to the contract shall be reviewed and the following steps taken:

a. Duplicate copies of official file documents, correspondence, reports, and other documents relating to the contract which are not required or appropriate for filing in official files shall be destroyed as soon as they have served their purpose, but in no event shall such documents be retained for longer than 1 year after acceptance of the final deliverable under the contract.

b. Routine documents pertaining only to this contract may be destroyed as soon as all actions related to the contract have been completed.

c. Documents not routine in nature which pertain to this contract shall be properly and clearly identified and forwarded to the KO for disposition with the official contract file within 1 year after acceptance of the final deliverable under the contract.

d. Forward to the KO a statement that the contract work has been satisfactorily completed. This may be accomplished by identifying the final payment voucher submitted to the disbursing office.

e. Check for unused dollars at the end of the contract performance. Unused dollars may be deobligated and used elsewhere.

Note: Records pertinent to outstanding exceptions, unsettled claims for/or against the United States, incomplete investigations, cases pending or under litigation, or similar matters should be retained for a period longer than 1 year after acceptance of the final deliverable.

SAMPLE REQUEST FOR NOMINATION

SUBJECT: Nomination of Contracting Officer's Representative on Solicitation
(*Enter solicitation number*)

1. This office is presently processing the subject solicitation from your activity to acquire (*insert item or service*). Please nominate an individual on your staff for duty as the Contracting Officer's Representative (COR) for the contract that may result from evaluation of offers in response to the subject solicitation.
2. Your nominee, whether military or civilian, should have technical qualifications, acquired through formal education, training, or pertinent experience, or any combination of the three, which qualify him/her to monitor the contractor's performance and to function as a technical representative of the contracting officer. The designation of the COR is ordinarily made for the life of the contract. Your nominee must have sufficient scheduled time remaining in your activity to serve as the COR at least through the base period of the contract. Your nominee should have completed a DoD approved COR course by the anticipated award date of (*insert date*).
3. The contract specialist processing your requisition is (*insert name*), phone (*insert area code and phone number*). Please complete the enclosed form, have the nominee sign it, and return it to the attention of (*Contract Specialist's Name*).

Contracting Officer

CONTRACTING OFFICER'S REPRESENTATIVE

APPOINTMENT LETTER

(Prescribed by AFARS 53.90, "Standard Army Formats")

(Use official letterhead and follow standard procedures for correspondence. Address the designation to the individual by name, including rank or grade, and full mailing address.)

SUBJECT: Designation of Contracting Officer's Representative (COR) for Contract (*Enter number.*).

1. Pursuant to DFARS 201.602-2 and AFARS 1.602-2-90, you are designated as the contracting officer's representative (COR) in administration of the following contract:

Contract Number:

For: (*Enter item/system/services.*)

Contractor:

Contract Period:

2. You are authorized by this designation to take action with respect to the following:

a. Verify that the contractor performs the technical requirements of the contract in accordance with the contract terms, conditions and specifications. Specific emphasis should be placed on the quality provisions, for both adherence to the contract provisions and to the contractor's own quality control program.

b. Perform, or cause to be performed, inspections necessary in connection with paragraph 2a and verify that the contractor has corrected all deficiencies. Perform acceptance for the Government of services performed under this contract.

c. Maintain liaison and direct communications with the contractor. Written communications with the contractor and other documents pertaining to the contract shall be signed as "Contracting Officer's Representative" and a copy shall be furnished to the contracting officer.

d. Monitor the contractor's performance, notify the contractor of deficiencies observed during surveillance and direct appropriate action to effect correction. Record and report to the contracting officer incidents of faulty or nonconforming work, delays or problems. In addition, you are required to submit a monthly report concerning performance of services rendered under this contract.

e. Coordinate site entry for contractor personnel, and insure that any Government-furnished property is available when required.

3. You are not empowered to award, agree to or sign any contract (including delivery orders) or contract modification or in any way to obligate the payment of money by the Government. You may not take any action which may affect contract or delivery order schedules, funds or scope. All contractual agreements, commitments or modifications which involve price, quantity, quality, delivery schedules or other terms and conditions of the contract shall be made by the contracting officer. You may be personally liable for unauthorized acts. You may not redelegate your COR authority.

4. This designation as a COR shall remain in effect through the life of the contract, unless sooner revoked in writing by the contracting officer or unless you are separated from Government service. If you are to be reassigned or to be separated from Government service, you shall notify the contracting officer sufficiently in advance of reassignment or separation to permit timely selection and designation of a successor COR. If your designation is revoked for any reason before completion of this contract, turn your records over to the successor COR or obtain disposition instructions from the contracting officer.

5. You are required to maintain adequate records to sufficiently describe the performance of your duties as a COR during the life of this contract and to dispose of such records as directed by the contracting officer. As a minimum, the COR file shall contain the following:

a. A copy of your letter of appointment from the contracting officer, a copy of any changes to that letter and a copy of any termination letter.

b. A copy of the contract or the appropriate part of the contract and all contract modifications.

c. A copy of the applicable quality assurance (QA) surveillance plan.

d. All correspondence initiated by authorized representatives concerning performance of the contract.

e. The names and position titles of individuals who serve on the contract administration team. The contracting officer must approve all those who serve on this team.

f. A record of inspections performed and the results.

g. Memoranda for record or minutes of any preperformance conferences.

h. Memoranda for record of minutes of any meetings and discussions with the contractor or others pertaining to the contract or contract performance.

i. Applicable laboratory test reports.

j. Records relating to the contractor's quality control system and plan and the results of the quality control effort.

k. A copy of the surveillance schedule.

l. Documentation pertaining to your acceptance of performance of services, including reports and other data.

6. All personnel engaged in contracting and related activities shall conduct business dealings with industry in a manner above reproach in every aspect and shall protect the U.S. Government's interest, as well as maintain its reputation for fair and equal dealings with all contractors. DoD 5500.7-R sets forth standards of conduct for all personnel directly and indirectly involved in contracting.

7. A COR who may have direct or indirect financial interests which would place the COR in a position where there is a conflict between the COR's private interests and the public interests of the United States shall advise the supervisor and the contracting officer of the conflict so that appropriate actions may be taken. CORs shall avoid the appearance of a conflict of interests to maintain public confidence in the U.S. Government's conduct of business with the private sector.

8. You are required to acknowledge receipt of this designation on the duplicate copy and return it to the contracting officer. Your signature also serves as certification that you have read and understand the contents of DoD 5500.7-R. The original copy of this designation should be retained for your file.

SIGNATURE BLOCK OF
CONTRACTING OFFICER

Receipt of this designation is acknowledged.

NAME: *(Print or type)*

SIGNATURE:

TITLE:

DATE:

RANK/GRADE:

TELEPHONE

DEPARTMENT OF THE ARMY
DEFENSE SUPPLY SERVICE-WASHINGTON

GUIDE FOR THE CONTRACTING OFFICER'S REPRESENTATIVE (COR)

1. The COR, a military or civilian Government employee, is designated in writing by the contracting officer to administer those aspects of a contract which cannot be administered practicably by DSS-W, Defense Contract Management Area Operations (DCMAO), or, in the case of contracts with educational institutions, by the Office of the Chief of Naval Research (ONR). Nomination of an individual to assume the responsibility of the COR is made by the requiring activity. A Defense Supply Service-Washington (DSS-W) Contract Specialist and an Administrative Contracting Officer (ACO) from either DCMAO or ONR will work with the COR during the life of the contract to provide advice and guidance as needed.
2. The COR is delegated limited authority by the Contracting Officer in accordance with the following:
 - a. FAR Subpart 2.1, Definitions, defining the authority of the Contracting Officer.
 - b. AFARS Subpart 42.90 - Contracting Officer's Representative (COR).
 - c. Terms and conditions of the contract.
 - d. Letter of Designation.
3. The COR shall not execute any contract agreement or any modification thereto on behalf of the Government. The COR does not have authority to decrease, increase, or change in any other way the scope of the contract, or to obligate payment of money by the Government. In the event the COR thinks the scope, delivery schedule or specifications of the contract should be changed such change shall be requested in writing to the contracting officer. The COR must be alert to the fact that any such change to a contract for Federal Information Processing resources may require an amendment to the Delegation of Procurement Authority (DPA) for contracts awarded prior to August 8, 1996 and to "Information Technology (IT) and National Security System (NSS) IT Acquisitions" for contracts awarded after that date. It is the COR's responsibility to ensure that, if an amendment is required, that the request for amendment is initiated sufficiently in advance of the anticipated change to insure that performance under the contract is not adversely impacted while waiting for the amendment.
4. The Contracting Officer shall rely on the COR's technical capabilities to effect the following controls:
 - a. Performance. Ensure that the contractor is performing in accordance with the specifications or scope of work of the contract. Clarify technical aspects for the contractor when

needed. Should a difference of opinion arise between the COR and the contractor, the matter shall be brought immediately to the attention of the Contracting Officer for appropriate action.

b. Delivery. Delivery requirements of a contract, including task orders written under a contract, are mandatory for the contractor and cannot be changed without a written modification to the contract issued by the Contracting Officer. If the Government contributes to delay of the contractor's performance, the contractor may request a time extension for performance from the contracting officer. If the COR thinks the contractor is not making sufficient progress to ensure timely delivery, the COR shall notify the Contracting Officer in writing.

c. Reports. It is usual for the contractor to forward reports required by the contract to the COR for review and approval. It is the responsibility of the COR to see that reports submitted comply with the reporting requirements as stated by the contract. Incomplete reports, late reports, or reports which fail to meet the terms and conditions of the contract shall be brought to the attention of the Contractor and the Contracting Officer.

d. Inspections. The COR has the right under the terms of the contract and is required to inspect and either accept or reject the Contractor's work during the course of and at the completion of the contract. The form and frequency of these inspections will be determined by the specific requirements and terms of each contract and the nature of the supplies or services the Contractor is required to provide, and should be designed to evaluate adequately those supplies and/or services. As defined by FAR Sub-part 46.101, "Inspection means examining and testing supplies or services (including, when appropriate, raw materials, components and intermediate assemblies) to determine whether they conform to contract requirements." This includes all applicable drawings, specifications, and purchase descriptions. Particular attention should be given to the completeness of documentation furnished by a contractor under contracts involving automatic data processing, software development, or programming to insure that it meets all the stated requirements of the contract. Inspection of contractor work under contracts for studies or research and development will consist of confirmation that contract objectives have been satisfied, and that reports and other deliverables provided by the contractor serve the purposes for which they were intended. Inspection by the COR on behalf of the Government will be accomplished prior to acceptance.

e. Acceptance. The COR should keep in mind that acceptance acknowledges that the supplies or services (except for latent defects) are in accordance with the terms and conditions of the contract, and are in conformity with all contract requirements, including those of quality, quantity, packaging and marking.

f. Payments. The COR is responsible for the execution and forwarding of receiving reports (e.g., signed DD 250s, DD 1155's, certified invoices, etc.) to the pre-certification or Finance and Accounting Office designated on the contractual document. The contract contains detailed instruction on the processing of invoices, etc., in order to effect payment. These documents must be processed completely and expeditiously to assure prompt payment to the contractor and to avoid penalties to the Government.

g. Security. Administration of security must begin before the contract is awarded and continue during the life of the contract. Solicitations and contracts which will require a contractor's access to classified information or material, shall include FAR clause 52.204-2, Security Requirements, as required by FAR Sub-part 4.404. The COR is the contractor's point of contact (POC) on day-to-day security matters. The COR is responsible for the processing of requests from the contractor for access to classified information (regardless of source), and for authority to visit Government or other contractor facilities.

h. Property control. Government furnished property and contractor acquired property for use under a contract must be controlled throughout the life of the contract. While the contractor is generally required to report the property, it is the responsibility of the COR to see that property records are properly maintained for reporting to the administrative contracting officer.

5. A copy of each written action taken by the COR pursuant to the contract shall be furnished to the DSS-W Contracting Officer and to the Administrative Contracting Officer, if the contract has been assigned outside DSS-W for administration.

6. The COR is required to comply with the Standards of Conduct prescribed in applicable Department Regulations and should review such regulations in accordance with appropriate service requirements.

7. COR's who have not completed a DoD recognized equivalent course should contact their appointing Contracting Officer to coordinate priority placement in this course.

Enclosure 5

JDSS-W/A

(date)

SUBJECT: Termination of Designation of Contracting Officer's Representative (COR) on
Contract DASW01-, MDA903-

(Name)

(address)

1. Your designation as Contracting Officer's Representative (COR) on the subject contract with (Contractor's Name) is terminated effective (date).
2. You are requested to check the applicable block relative to contractor performance and describe briefly any problem areas.
3. As soon as the contracting officer provides the forms and instructions for completing them, you are required to prepare a past performance assessment of the contractor.

PROBLEM AREAS: (If none, so state)

4. Forward all files pertaining to the subject contract to the successor COR designated in attachment 1.
5. The addressee shall acknowledge receipt of this letter below and return the copy to the undersigned.

Contracting Officer

ACKNOWLEDGMENT OF RECEIPT

Contracting Officer's Representative

(Date)

DFARS SUBPART 201.6 - CONTRACTING AUTHORITY AND RESPONSIBILITIES

201.602 Contracting officers.

201.602-2 Responsibilities.

Contracting officers may designate qualified personnel as their authorized representatives to assist in the technical monitoring or administration of a contract. A contracting officer's representative (COR)--

- (1) Must be a Government employee, unless otherwise authorized in agency regulations.
- (2) Must be qualified by training and experience commensurate with the responsibilities to be delegated in accordance with department/agency guidelines.
- (3) May not be delegated responsibility to perform functions at a contractor's location that have been delegated under FAR 42.202(a) to a contract administration office.
- (4) May not be delegated authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract.
- (5) Must be designated in writing, and a copy furnished the contractor and the contract administration office, --
 - (i) Specifying the extent of the COR's authority to act on behalf of the contracting officer;
 - (ii) Identifying the limitations on the COR's authority;
 - (iii) Specifying the period covered by the designation;
 - (iv) Stating the authority is not redelegable; and
 - (v) Stating that the COR may be personally liable for unauthorized acts.
- (6) Must maintain a file for each contract assigned. This file must include, as a minimum--
 - (i) A copy of the contracting officer's letter of designation and other documentation describing the COR's duties and responsibilities; and
 - (ii) Documentation of actions taken in accordance with the delegation of authority.

PROVIDING GOVERNMENT PROPERTY TO CONTRACTORS

1. Providing Government Property to Contractors. In accordance with FAR, DFARS, and AFARS Parts 45.3, offering or providing any Government property to contractors must be justified in a written D&F which clearly demonstrates that it will be in the best interest of the Government. The D&F must be prepared by the requiring activity and, unless it is for signature at the OSD level (FAR 45.302-1(a)(4)), must be signed by the program or project manager, as appropriate. The D&F shall be included in the contract file. (*See FAR 45.302-45.310 and DFARS 245.302-245.310 for rules governing specific types of property and circumstances.*) The D&F must include a --

- a. Description of the property to be provided;
- b. Cost benefit analysis which addresses the cost of storing, handling, administering, safeguarding, maintaining/servicing and replacing property; and liability to the Government if equipment is not available;
- c. Description of the methods and resources to be used in property administration to ensure the contractor will maintain severability and prevent commingling; and
- d. Discussion, if any, of the impact on mobilization planning.

2. Special Requirements for Research and Development Contracts.

a. In accordance with DFARS 35.014-90, prior to entering into a contract for research or development which provides for the acquisition of property, or furnishing to a contractor such property, the Secretary of the Army must determine that the property is necessary for the performance of the contract (10 U.S.C. 2353). In the Army, authority to approve such requests has been delegated to the ASA(RDA). See 1.707.

b. Each request for Secretarial determination shall be forwarded through to the addressee in DFARS 1.290(b)(5) and contain the following information:

- (1) A detailed description of the acquisition supporting a finding that the contract is for research or development or both.
- (2) The contract type and funds to be used.
- (3) Property or services to be acquired.
- (4) Name of potential contractor.
- (5) Any urgency considerations.

(6) A description of the property to be acquired by the contractor or furnished to the contractor by the Government. Include the estimated cost of the property to be provided by the contractor or the Government and the reasons this property is necessary for the performance of the contract.

(7) When the Government will furnish property to the contractor, an explanation of how it will be provided, e.g., loan, lease, sale, or other. When reimbursement will be sought under a lease or sale, provide the fair market value that will be charged to the contractor.

(8) Details concerning ownership of property, e.g., Government-owned, private, etc.

(9) Details concerning whether the property is removable or separable without unreasonable expense or unreasonable loss of value.

3. Documentation of Government Property in Solicitations and Contracts.

a. All solicitations offering Government property for use by contractors and all contracts under which the Government is to furnish property to contractors must contain specific identification of all Government property to be offered or furnished, to include nomenclature, quantity, acquisition value and, where applicable, model number, serial number and year of manufacture.

b. The COR must provide to the contracting officer, in writing, any changes to Government property made over time. This information must then be reflected by modifications to the contract.

4. Maintenance of Records of Contracts Bearing Government Property.

All requesting activities shall provide, in writing, a record of any open contracts which provide for Government property to be furnished to or acquired by the contractor.

NOTE: The information provided herein is not to be construed as all inclusive. Other FAR, DFARS, and/or AFARS guidance may apply; therefore, please contact the contracting officer for any additional information as may be required for your specific acquisition.

CONTRACT MODIFICATIONS AND TERMINATIONS

During the life of a contract, some terms and conditions may have to be altered for valid reasons. Sometimes, because of the nature of the work, there is reasonable expectation before a contract is ever awarded that changes will occur, and at other times unexpected situations develop that necessitate changes. All valid changes to a contract or to a delivery order under that contract, must be made in writing by the Contracting Officer (KO). Written changes to a contract or delivery order are referred to as modifications.

1. Contract Modifications.

a. Modifications Pursuant to Contract Clauses.

(1) Because it is recognized either through prior knowledge or common sense that changes of one sort or another are inevitable, many of the hundreds of standard clauses that can be included in Government contracts contain language that authorize the KO to change certain terms or conditions by issuing a modification. The permissive language of these clauses not only gives the KO the authority to make the changes, but also serves to advise the contractor in advance what aspects of the contract will be subject to change if the necessity arises.

(2) A most powerful and useful clause that is contained in most Government contracts to facilitate making changes is called, simply, the Changes clause, of which there are several versions depending on what is being acquired and what contract type is used. The standard Changes clause for fixed-price supply contracts, for example, authorizes the KO to issue unilateral modifications to the specifications, place of delivery or performance, or method of shipping or packing. The contractor is legally required to comply with all modifications made pursuant to a Changes clause. If the change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under the contract, whether or not changed by the order, the KO is required to make an equitable adjustment. If the KO and the contractor are unable to reach agreement on any equitable adjustments, the KO makes a determination as to the adjustment. If the contractor does not agree with the determination, the matter is resolved in accordance with the Disputes clause.

b. Other Contract Modifications. Although many types of changes can be anticipated and covered by appropriate contract clauses, it is sometimes necessary or desirable to change some aspect of a contract due to an emergent and unanticipated situation. For example, the Government may discover that it can furnish as Government-furnished-property (GFP) an item that the contractor was to make or buy from another source, or the Government may determine that it wants the contractor to perform a particular test that was not specified in the contract as awarded. Such change would be made as a written bilateral modifications to the contract, and would provide that mutually agreeable consideration be received by both parties. In the first of the two examples, the Government would be entitled to a price reduction because it is going to furnish an item that the contractor had originally planned to provide. In the second example, the

contractor would be entitled to a price adjustment and possibly a schedule adjustment because of the new testing requirement.

c. The Concept of Contract Scope.

(1) The Government's authority to modify a contract is not unlimited, particularly with regard to requiring the contractor to perform any additional work. Any additional work required must be within the scope of the contract. In simple terms this means the additional work must be generally related to the work envisioned in the original agreement. If a contemplated change is beyond the scope of the contract, a new procurement must be processed. A common situation where this problem arises concerns the desire for an increased quantity of items on a supply contract. Even though the items may be exactly the same as ones being manufactured under a current contract, a modification to that contract to increase the quantity would be beyond the scope of the contract and not be permissible (assuming the contract did not contain an option for an additional quantity or otherwise permit changes to the quantity). If a contract were awarded for the design (and only the design) of an automated information system, it could not be later modified to have the contractor provide and install hardware.

(2) Whether or not a contemplated change is within or beyond the scope of a contract is often not clear cut, so CORs must discuss all proposed changes with the KO or legal counsel if necessary to obtain a determination.

d. Processing Modifications. Modifications to contracts can have significant ramifications for the entire acquisition so it is important that they be planned, reviewed, and executed systematically and with caution. Most agencies have established procedures for treating modifications which generally contain these features:

(1) **Minimizing changes** - As a general rule, it is in everyone's best interest to keep changes to a minimum. Ideally, the contract specifications or statement of work should be so well written that performance can take place and the supplies or services delivered without any changes occurring. Planning is the key. While it is unrealistic to think that no modifications should ever take place, particularly in complex acquisitions or R&D procurements, it is a fact that many modifications are made that could have been avoided by sound planning.

(2) **Evaluating proposed changes** - When a change is contemplated or proposed, its effect on cost, delivery, and other factors should be evaluated carefully. Changes to contract specifications almost always have an effect on cost. The timing of a change is important since, as a general rule, it is less expensive to make a change earlier in a process than after it is well underway. It would be less expensive to establish a cut-off point for a change and have all subsequent items produced to the new specifications but not rework those items already produced; however, the effect of this action on standardization would have to be considered.

(3) **Impact of Changes** - The impact of changes on the delivery schedule must also be evaluated. Although it may be relatively easy to determine the time required to accommodate one

change, the cumulative effect of a combination of changes might be more difficult to ascertain and must be considered.

(4) COR Involvement - CORs will find themselves heavily involved in the process of evaluating proposed changes. The impact on overall program goals must be carefully weighed against the above considerations before a recommendation for a change is formally proposed or initiated.

(5) Reviewing proposed changes - For some acquisitions, a formal change review board is established to review and approve all proposed changes. This is most common in complex contracts and those where the configuration of the end product or products must be closely controlled. A review board normally considers and approves or disapproves a proposed change after a technical review has been performed by personnel from the requiring activity. The boards are usually made up of the KO and middle to upper level managers from the program office or requiring activity.

(6) Executing modifications - When a determination has been made that a modification will be made to a contract, the requiring activity usually must prepare a purchase request (PR) or similar document to formally request that the KO make the modification. Then the KO normally will process the modification in one of two ways. Either the formal modification will be issued in writing to the contractor after which time the equitable adjustments will be negotiated, or the adjustments will be negotiated first and then the formal modification issued.

e. Unauthorized Changes. The single most common problem that the Government encounters with the administration of its contracts is that of unauthorized changes. Only a KO is authorized to issue modifications to a contract. CORs must guard against taking any action, verbal or written, intended or unintended, that may be interpreted by a contractor as an authorization to alter the terms of the contract. As clear and simple as this may be, the Government constantly finds itself plagued by occurrences of unauthorized changes. Unauthorized changes may turn out to be legally binding, sometimes to the Government's embarrassment and dismay. Most occurrences usually fall into these categories:

(1) Waivers and deviations - The requirement that all changes to a contract be effected by a properly executed modification and that the Government give or receive consideration for all changes is not avoided by calling the action a waiver or deviation. Doing so implies that the change is so minor as to not be worthy of an official modification. CORs and other individuals involved with contract administration process can be tempted to waive a contractual requirement or authorize a deviation from the contract specifications without fully considering the ramifications of their actions. If the contractor is being relieved from a part of its responsibilities, the Government is entitled to receive something in return. In addition, a series of seemingly minor actions can rapidly snowball into a major problem. Rest assured that the Government can (and usually should) waive contract requirements that prove to be unnecessary or authorize deviations from specifications when appropriate, but such actions should be taken only through the official modification process.

(2) **Extra work** - Unauthorized requests for the contractor to perform extra work will usually result in problems. The Government's interests are not served if a contractor performs extra work as the result of an unofficial request from a COR and, after its completion, files a claim for an increase in price. Claims for additional work are particularly difficult to resolve because of the problem of distinguishing between voluntary actions by the contractor and extra work directed by the Government. The Government could reap the benefit of the former at no additional cost, whereas the latter would incur an obligation.

(3) **Constructive changes** -

(a) De facto modifications to a contract can occur through the conduct of Government personnel, frequently without their being aware of the effect of their conduct. Any action by a Government employee that is not a formal modification, but which has the effect of requiring the contractor to perform work different from that prescribed in the original contract, constitutes a constructive change order and may require some relief to the contractor. Examples of a constructive change include a COR directing a contractor to make a deviation from a specification or a KO, in attempting to clarify an issue for a contractor, providing information that later turns out to be incorrect. Suggestions offered by technical personnel do not constitute constructive changes, but great care must be exercised to ensure that a suggestion is not misconstrued as being a directive. Constructive changes often consist of letters, telegrams, reports, or other documents directing, in substance, that additional work be performed, but without ever using the words "modify" or "change."

(b) The action on the part of the Government that eventually results in a constructive change may have taken place prior to contract award. The following are examples of situations where the Government has been found to have made constructive changes even though its improper action took place before contract award:

- specifications or contract provisions that are literally impossible to perform because they contain conflicting requirements or require work beyond the state-of-the-art
- specifications or contract provisions that are worded in general terms, are unclear, or are open to more than one interpretation
- drawings that contain errors, omissions, inaccuracies, or inconsistencies.

2. **Contract Terminations.** The majority of Government contracts run their normal courses with both parties fulfilling their obligations under the agreements. In some cases, however, it becomes necessary for one reason or another to end the relationship prior to the completion of all obligations by the process known as termination. Some terminations are noncontroversial and others are bitterly contested, but all of them represent major business decisions on the part of the Government which must be undertaken with considerable thought and planning.

a. The COR's Role in Terminations. In most cases, the first indication of the possible need to terminate a contract originates with technical personnel. It is they usually who are the first to realize that the need for the supplies or services no longer exists, that the contractor's performance has become unsatisfactory, or that some other situation has developed that warrants termination of a contract. The COR must understand the conditions under which contracts can be terminated, the considerations that go into making a termination decision, and the procedures for effecting terminations so that sound recommendations can be made to the KO when terminations become necessary.

b. Decisions to Terminate.

(1) With all the time and effort that must go into planning, soliciting, awarding, and administering a contract, any decision to terminate a contract must be made with the understanding that some or all of that work may have been for naught. Nevertheless, when all factors have been considered and it is deemed in the Government's best interest to terminate, the action should be initiated and completed expeditiously.

(2) **Supplies/Services No Longer Needed.** The most obvious situation that can lead to a termination is one where the supplies or services being acquired are no longer needed. The Government is under no obligation to buy something it no longer requires, and it normally should terminate any and all contracts for the product or service as soon as that fact is known. Some judgments must be made, however. As we will discuss later, contractors can be entitled to some consideration in termination situations depending on the circumstances, so thought must be given to the cost of termination versus the cost of allowing performance to continue. For example, it might be more advantageous for the Government to allow a contractor to finish a production run of ten items and accept and pay for them, rather than incurring production shutdown costs and be left with ten partially completed items.

(3) **Funding Constraints.** Funding constraints can force the Government into a termination situation. Although agencies cannot award a contract unless the proper funding arrangements have been made, sometimes unexpected funding shortfalls appear after award, and there is no alternative but to terminate. The key in this situation is for the COR to recognize this situation and to take action as early as possible so that enough funding will remain to allow for an orderly termination. If the funding shortfall is expected to be temporary (i.e., you will probably receive the funding, but later than you anticipated), the KO should be consulted and asked to see if arrangements could be made with the contractor to work around the problem.

(4) **Contractor Noncompliance.** When noncompliance on the part of the contractor is the cause of a termination situation, the decision to terminate is more complex. First, the Government must ensure that it has valid documentation of the contractor's noncompliance and that the Government is in no way responsible for it. Then the cost of the termination must be weighed against what benefits might accrue. The cost will include not only any termination costs to which the contractor might be entitled but also the cost of processing a new acquisition to satisfy a still-existing need. If the contract is interrelated with other contracts, there might be a cost or schedule impact on them.

c. Scope of Terminations. In making termination decisions, it should be recognized that terminations may be either partial or complete. If a contract is completely terminated, all work is stopped. A partial termination ends only a portion of the work remaining on the contract. While terminations for poor performance are usually complete, other terminations are often for only a portion of the quantity of supplies or for just part of a work effort.

d. Types of Terminations. Terminations fall into one of two categories - terminations for the convenience of the Government or terminations for default. The obligations of the Government differ for each type of termination, and the COR is often involved in the discussions and negotiations which determine those obligations.

(1) Termination for Default (T for D) -

(a) Assuming that the contractor's poor performance has been adequately and properly substantiated (including the issuance of cure or show cause notices), that the situation has been discussed with the KO and legal counsel, and a firm decision to terminate for default has been made, the KO will issue a termination notice in accordance with the Termination clause of the contract. The Government must then determine what, if anything, it owes the contractor.

(b) Under fixed price contracts, the contractor is not entitled to be reimbursed for work performed prior to the termination which has not yet been accepted by the Government, and the Government is entitled to repayment of any unliquidated advance or progress payments applicable to such work. The Government may, at its election, require the contractor to deliver any completed or partially completed work for which the Government would then be obligated to pay a reasonable price. The contractor is also obliged, if directed by the KO, to protect and preserve any property in which the Government has an interest, and is entitled to compensation for any expenses in so doing. Last, but not least, if the Government subsequently repurchases the same or similar supplies or services called for by the terminated contract from another contractor, the terminated contractor would be held liable for the excess costs of repurchase if any.

(c) Under a cost-reimbursement contract, the contractor is entitled to all normally allowable and allocable costs incurred up to termination and to a proportionate part of the fee as the number of articles (or amount of services) accepted by the Government is to the number of articles (or amount of services) required by the contract. Costs associated with protecting, preserving, or returning items in which the Government has an interest are allowable. The contractor is not, however, liable for excess repurchase costs.

(2) Termination for Convenience (T for C) -

(a) All terminations not made for default are, by definition, for the convenience of the Government. Terminations for convenience involve no wrongful acts on the part of the contractor. Accordingly, the terms of the contract settlement are more favorable for terminations for convenience than for terminations for default.

(b) Under a fixed-price contract, the contractor is entitled to be compensated for the costs incurred up to the time of termination and a reasonable profit on those costs. In effect, when a fixed price contract is terminated, it becomes, for all practical purposes, a cost reimbursement contract. The contractor submits a termination settlement proposal which is reviewed by the KO and CORs, and terms of the settlement are negotiated and agreed to. Reasonable costs incurred by the contractor in processing the settlement are allowable, but no profit on such costs is payable.

(c) Under cost-reimbursement contracts, the contractor is entitled to all allowable and allocable costs incurred up to the termination and to a percentage of the fee equal to the percentage of completion of the work contemplated under the contract. Costs associated with protecting, preserving, or returning items in which the Government has an interest are allowable, as are all reasonable costs associated with the preparation of the settlement proposal. Once again, the KO, with the advice of the COR, will negotiate a mutually acceptable agreement with the terminated contractor.

3. Disputes. There are a variety of situations where the KO and the contractor have had to reach agreement on various subjects, such as consideration for a change to the terms of a contract or the costs allowable under a termination-for convenience situation. If a contractor fails to submit a settlement proposal pursuant to a termination for convenience of the Government within the time specified in the contract and has failed to request an extension from the KO, the contractor has no right of appeal for any settlement by determination. But in most cases, agreements are reached, although sometimes it results from a long drawn-out negotiation process. There are times, however, when the parties will not be able to reach agreement. In such cases, the KO will execute a final decision and provide rationale for that decision. If the contractor does not agree with the decision, it may submit an appeal, as discussed below, pursuant to the Disputes clause.

a. The COR's Involvement. Because of their technical knowledge and their close involvement with a contract, CORs are usually involved in the settlement of disputes, and their input often forms the basis of the Government's position during the entire disputes process. When attempting to determine who is right and who is wrong with regard to acceptable contract performance, technical insight and expertise is critical to fairness and accuracy.

b. The Disputes Process. The following discussion contains the chronology of the disputes procedures established by the Contract Disputes Act of 1978.

(1) Filing a Claim. The contractor must first file its claim in writing to the KO. If the claim is for an amount in excess of \$100,000, the contractor must certify that the claim is being made in good faith (to avoid frivolous claims) and that the supporting data are accurate and complete to the best of its knowledge and belief.

(2) The KO's Decision. In most cases the parties will be able to negotiate a settlement; however, in the event the parties are unable to agree on a sum, the KO has 60 days to either issue a decision or to advise the contractor of the time within which a decision will be made. If the KO fails to issue a decision within a reasonable time, the contractor may request the agency's Board of

Contract Appeals to establish a timeframe within which the KO must issue a decision. Failure to meet the deadline established by the board may be deemed a decision denying the claim, thereby giving the contractor the right to immediately file an appeal with the board or to file suit in the U. S. Claims Court. When the KO does make a decision, it must be in writing, provide the reasons for the decision, and advise the contractor of its right to appeal the decision.

(3) **Appealing the KO's Decision.** If the contractor receives an unfavorable decision from the KO, the decision may be appealed either to the agency's Board of Contract-Appeals or brought to the U. S. Claims Court.

(a) **Agency Board of Contract Appeals.** The contractor has 90 days to file an appeal with the board and has three avenues to take depending on the size of the claim. If the claim is for \$50,000 or less, the contractor may request that it be handled under an expedited procedure whereby it may be decided by a single board member acting, whenever possible, within 120 days. If this method is chosen, the contractor waives all future rights of appeal. If the claim is for \$100,000 or less, the contractor may request that it be processed under an accelerated procedure whereby a decision must be rendered within 180 days. The contractor retains all appeal rights under this method. If the claim is for more than \$100,000, it must be processed by a full board in accordance with its standard formal procedures.

(b) **The U. S. Claims Court.** The contractor may appeal the KO's decision directly to the Claims Court within 12 months, a considerably longer time than that allowed to appeal to the agency board.

(4) **Further Appeals.** Both the contractor and the Government have the right to appeal the decisions of either the agency board or the Claims Court to the Court of Appeals for the federal circuit which was created by statute in 1982. The appeal must be brought within 120 days of the board's or the Claims Court's decision. Before the Government can appeal to the Court of Appeals, however, the agency head must obtain the approval of the Attorney General of the United States.

4. **Contract Close-Out.** Generally, a contract will run its normal course. The Government will have satisfied its need through the performance of the contract, and the contractor will have been fairly compensated for its performance. All that remains is for the contract to be officially closed-out. Some of the close-out burden falls on the COR's shoulders. The COR must ensure that the completion of all contractor performance has been documented, that all appropriate acceptance documents have been properly prepared and submitted, and that all Government property or information provided to the contractor has been returned. The COR must advise the KO when these actions have been completed. The agency's finance organization should likewise be notified of completion so they can make the necessary accounting transactions.

CONTRACTOR PAST PERFORMANCE

[PAST PERFORMANCE INFORMATION (FOR ARMY) IS CURRENTLY UNDER REVISION. THIS SECTION WILL BE REVISED AS SOON AS NEW INFORMATION IS PUBLISHED.]

Past performance is relevant information regarding a contractor's actions under previously awarded contracts. The responsibility determination required by FAR 9.103 is an evaluation of an offeror's past performance to determine whether that offeror is capable of performing. Responsibility is a "go/no-go" decision. It answers the question "can the offeror do the work?" In source selection a comparative analysis of past performance records is used to discriminate between otherwise acceptable offers. The idea is to look for relative ratings among offers and make a determination of performance risk. Performance risk is an assessment of the probability that an offeror will successfully perform the contract. The source and type of past performance information used in making a performance risk assessment is within the broad discretion of the contracting officer, and should be tailored to the circumstances of each procurement.

Contracting officers may use whatever information is available to the buying office about an offeror's past performance when making an award. If the agency establishes an automated or other past performance reporting system for recording past performance information across the agency, data should be retained as determined by the agency, but not more than three years. Simplified documentation procedures may be used to support the final action taken. A note in the file stating instances of late deliveries or poor quality on prior awards would suffice. When requested, the contracting officer should explain the reason for selection of the higher priced offeror, and be able to support that reasoning with back-up documentation.

Past performance may be obtained from numerous sources; the offerors' references, commercial sources, pre-award surveys, on-site Government people at a contractor's facility, field data collection systems, and other procuring offices that are or were customers of the offeror.

It should be noted that the Office of Federal Procurement Policy has suspended mandatory implementation of the requirement to use past performance in source selections on contracts below \$1M and to collect past performance information on contracts less than \$1M. Additional information will follow when available.

The following various and recent FAR and AFARS guidance regarding contractor past performance is provided to assist you in preparation of your requirements:

FAR 15.604 Responsibilities.

(b) The cognizant technical official is responsible for the technical and past performance requirements related to the source selection process.

FAR 15.605 Evaluation factors.

(b)(1) The evaluation factors that apply to an acquisition and the relative importance of those factors are within the broad discretion of agency acquisition officials, except that --

(i) Price or cost to the government shall be included as an evaluation factor in every source selection.

(ii) Past performance shall be evaluated in all competitively negotiated acquisitions expected to exceed \$100,000 not later than January 1, 1999, unless the contracting officer documents in the contract file the reason why past performance should not be evaluated. Agencies may develop their own phase-in schedule for past performance evaluations which meets or exceeds the following milestones: All solicitations with an estimated value in excess of

- \$1,000,000 issued on or after July 1, 1995;
- \$500,000 issued on or after July 1, 1997; and
- \$100,000 issued on or after January 1, 1999.

(iii) Quality shall be addressed in every source selection through inclusion in one or more of the non-cost evaluation factors, such as past performance, technical excellence, management capability, personnel qualifications, prior experience, and schedule compliance.

(2) Any other relevant factors, such as cost realism, may also be included.

(d) The solicitation should be structured to provide for the selection of the source whose proposal offers the greatest value to the Government in terms of performance, risk management, cost or price, and other factors. The solicitation shall clearly state the evaluation factors, including cost or price, cost or price-related factors, past performance and other non-cost or non-price-related factors, and any significant subfactors, that will be considered in making the source selection, and their relative importance. Numerical weights, which may be employed in the evaluation of the proposals, need not be disclosed in solicitations. The solicitation shall inform offerors of minimum requirements that apply to particular evaluation factors and significant subfactors.

FAR 15.608 Proposal evaluation.

(2) Past performance evaluation.

(i) Past performance information is an indicator of an offeror's ability to perform the contract. The comparative assessment of past performance information is separate from the responsibility determination required. The number and severity of an offeror's problems, the effectiveness of corrective actions taken, the offeror's overall work record, and the age and relevance of past performance information should be considered at the time it is used.

(ii) Where past performance is to be evaluated, the solicitation shall afford offerors the opportunity to identify Federal, state and local government, and private contracts performed

by the offerors that were similar in nature to the contract being evaluated, so that the Government may verify the offerors' past performance on these contracts. In addition, at the discretion of the contracting officer, the offerors may provide information on problems encountered on the identified contracts and the offerors' corrective actions. Past performance information may also be obtained from other sources known to the Government. The source and type of past performance information to be included in the evaluation is within the broad discretion of agency acquisition officials and should be tailored to the circumstances of each acquisition. Evaluations of contractor performance prepared in accordance with 48 CFR part 42, subpart 42.15 are one source of performance information which may be used.

(iii) Firms lacking relevant past performance history shall receive a neutral evaluation for past performance.

15.610 Written or oral discussion.

(c)(6) Provide the offeror an opportunity to discuss past performance information obtained from references on which the offeror had not had a previous opportunity to comment. Names of individuals providing information about an offeror's past performance shall not be disclosed.

42.1502 Policy.

(a)(ii) When the contract period of performance will exceed 18 months, prepare interim evaluations on an annual basis. Interim evaluations shall be purged from Past Performance Information files upon completion of the final contract evaluation.

- (iii) As a minimum, contractor performance evaluations shall include--
- (1) Name of contractor and division, address, and Contractor Establishment Code (CEC);
 - (2) Contract number;
 - (3) Contract value (base plus options);
 - (4) Contract award date;
 - (5) Contract completion date;
 - (6) Contract placement information
 - (A) Contract type,
 - (B) Small business status,
 - (C) Sealed bid/negotiated,
 - (D) Competitive/noncompetitive;
 - (7) Text description of requirement and applicable Federal Supply Code (FSC);
 - (8) Type of evaluation -- interim or completion (if interim, also provide the period covered by the evaluation);
 - (9) Narrative evaluation (address quality of product or service, timeliness of performance, and, where appropriate, history of forecasting and controlling costs, business relations, customer satisfaction, past performance of employees, and subcontract management.
 - (10) The evaluator's name, address, phone number, and dated signature.

42.1503 Procedures.

(a) Where appropriate, solicit input to contractor evaluations from the contract administration office.

(c) Pending establishment of a central Army or DoD database, each HCA shall establish and maintain a central file for contractor performance information. This data shall be made available to contracting offices and other authorized individuals within the contracting activity as necessary to comply with FAR 9.105-1 and 15.608(a)(2).

(d)(i) The U.S. Army Contracting Support Agency, Contract Statistics Office (SFAE-CSA-PPS) shall establish and maintain a listing of Army contracting activities and the contractors with whom each activity has had business relations. The listing shall also include the names and phone numbers of those personnel within each activity authorized to receive and disseminate contractor performance information. When contractor performance information is required from sources outside the contracting activity, call the Contract Statistics Office at (703) 681-7567 or DSN 761-7567.

(ii) Within 15 days following the end of each quarter, contracting activities shall update the names and phone numbers (both commercial and DSN) of the primary and alternate points of contact who are authorized to obtain and disseminate contractor performance information. Provide this information to the addressee at 1.290(b)(5).

Information Available. Excellent additional information in the form of a booklet entitled **“A Guide to Best Practices for Past Performance”** is available from the following address:

Office of Publications
725 17th Street, N. W., Room 2200
New Executive Office Building
Washington DC 20503

Contractor Performance Report. The attached format (Attachment 1), or something similar, must be completed by the COR and returned to the DSS-W after contract completion so that the KO can comply with regulatory requirements. Interim evaluations may be requested by the DSS-W contracting officer.

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CONTRACTOR PERFORMANCE REPORT

☐ Final ☐ Interim Period Report: From: _____ to _____

1. Contractor Name and Address (Identify Division) 2. Contract Number: _____

3. Contract Value (Base plus Options): _____

4. Contract Award Date: _____

CAGE Code: 5. Contract Completion Date: _____

6. Type of Contract (Check all that apply): ☐ FFP; ☐ CPFF; ☐ ID/IQ; ☐ Requirements;
☐ SBSA; ☐ 8(a); ☐ Sealed Bid; ☐ Non-Competitive, ☐ Other _____

7. Description of Requirement:

8. Ratings:

Quality of Product or Service Excellent Good Satisfactory Marginal Unsatisfactory
Comments:

Cost Control (If applicable) Excellent Good Satisfactory Marginal Unsatisfactory
Comments:

Timeliness of Performance Excellent Good Satisfactory Marginal Unsatisfactory
Comments:

Customer Satisfaction - CA Team/Business Relations Excellent Good Satisfactory Marginal Unsatisfactory
Comments:

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Attachment 1 to Contractor Past Performance (front)

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Customer Satisfaction - Unsatisfactory End user/Business Relations Comments	Excellent Good Satisfactory Marginal
Overall Raters Assessment: Excellent Good Satisfactory Marginal Unsatisfactory	
9. Key Contractor Personnel: Services and R&D only (applies only to contractually designated individuals):	
Key Personnel Name: _____ Employment Dates _____ Comments/Rating	
Name: _____ Employment Dates _____ Comments/Rating	
10. Contracting Officer: _____ Signature: _____ Phone/FAX/Internet: _____	
11. Contractor's Review. Comments provided? <input type="checkbox"/> Yes - Number of pages _____ <input type="checkbox"/> No. Contractor's Name: _____ Signature: _____ Phone/FAX/Internet: _____	
12. Agency Review. Review required? <input type="checkbox"/> Yes. Number of pages ____ <input type="checkbox"/> No.	
13. Reviewer : _____ Signature: _____ Title: _____	

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Attachment 1 to Contractor Past Performance (back)

PART 2

LEGAL

REQUIREMENTS

AND

RESTRICTIONS

ALTERNATE DISPUTE RESOLUTION

The Contract Disputes Act of 1978 established the present procedure for dispute resolution over contract performance issues (protest procedures not included). The disputes process usually begins when the contractor submits a claim to the contracting officer, unless the contracting officer is asserting a claim against the contractor. FAR 33.201 defines a claim as a written demand or assertion by one of the parties seeking, as a matter of right, the payment of money, in a certain sum, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. A claim rises to the level of a dispute when the contractor and Government cannot agree on the rights and obligations of the contracting parties.

The disputed claim results in a Final Contracting Officer's Decision. The contractor's claim is denied and its right to appeal commences. The contractor has the right to appeal the decision to either the Armed Services Board of Contract Appeals (ASBCA), or the U.S. Court of Federal Claims. Most appeals are made to the ASBCA, which allows contractors to prosecute their appeals without hiring an attorney. The ASBCA is a DoD agency with Administrative Judges that conduct hearings similar to a trial. The Court of Federal Claims is a court, with Federal Judges, more formal than the ASBCA. In both forums, hearings are conducted before a single hearing judge while decisions are rendered by a panel of three judges.

Disputes in either the ASBCA or Court of Federal Claims are often lengthy; time consuming; and expensive. Prior to a hearing the parties usually conduct extensive discovery of each other's case through interrogatories and depositions. Hearings on simple cases generally take one or two full days, while complex cases may take several days or weeks. In most cases, decisions are not rendered for months or years, and additional appeal to the Court of Appeals for the Federal Circuit (CAFC) is possible. Because of the expense and delay, contractors and Government have sought alternatives to time consuming and expensive litigation.

Alternate Disputes Resolution (ADR) procedures have been adopted by the ASBCA, ENGBCA (Corps of Engineers Board of Contract Appeals), and the Court of Federal Claims. The use of ADR is consensual and voluntary. Both parties and the Board (or Court) must agree to use ADR. ADR can be used prior to appeal, generally it is used once the appeal is made.

ADR is best used in those cases in which only facts are in dispute. The most difficult cases to resolve through ADR are those in which disputed law is applied to uncontested facts. ADR is encouraged by the Boards/Court, and use of any reasonable method is permitted. The four most common methods of ADR may or may not involve Board/Court participation, as follows:

1. Settlement Judge: A single judge or hearing examiner is appointed for the purpose of facilitating settlement. The judge has no formal or informal authority. The judge may meet with the parties either jointly or individually. The judge usually initiates frank, in-depth discussions with the parties regarding the strengths and weaknesses of each party's position. The settlement judges' recommendations are not binding on the parties.

2. Minitrial: The minitrial is a highly flexible, expedited, but structured, procedure where each party presents an abbreviated version of its position. Short position papers are exchanged at an agreed on time. The parties' attorneys present their cases in a conference type setting. The presentations are made to principals of the parties with contracting authority and an appointed neutral advisor. The neutral advisor is normally a retired judge, law professor, or technical expert. The principals and neutral advisor participate in the presentation of the evidence as provided in their advance minitrial agreement. After the conclusion of the evidence, settlement negotiations are conducted with the assistance of the neutral advisor. Minitrial procedures are designed to meet the needs of the dispute. Neutral advisor's recommendations are not binding on the parties. If the minitrial fails to resolve the dispute, the case is heard by the Board/Court as if the minitrial had not taken place. No statements or positions taken at the minitrial can be used against the parties later on in a hearing.

3. Summary Trial with Binding Decision: The scheduling of the trial is expedited and the parties try the case informally before a judge (often one judge) or panel of judges. Pretrial discovery is limited and normal trial rules are relaxed or eliminated in order to speed up the appellate process. After the evidence has been presented, the judge/s will issue a "bench" decision (immediate) in the simple cases. In more complex cases, the judge/s will issue a decision within ten days of the trial or receipt of the trial transcript. The parties must agree that all decisions under this method shall be final, and not appealable, except for fraud. The decision has no precedential value to the Board/Court for future cases.

4. Non-binding Arbitration: An arbitration agreement is negotiated in which the parties agree to submit their cases to a panel of neutral Arbitrators. Arbitrators are normally selected jointly, or the parties select their own arbitrator who then jointly select another neutral arbitrator. In technical cases, the neutral arbitrator is generally a technical expert. Exhibits and position papers are exchanged. Witnesses are presented, but the parties attempt to stipulate as to undisputed facts. Audio/visual aids, depositions and oral argument may be allowed in the arbitration agreement. The arbitrators submit a report of their findings which may require further negotiations. The arbitration is non-binding, and failure to reach an agreement would result in a resumption of the Board/Court litigation.

There are other methods of ADR which have not been discussed, since some are simply minor deviations of one of the four methods described, or not normally used by the Government in ADR. Mediation is similar to the Settlement Judge procedure, and Binding Arbitration is not used in Government Contract Disputes.

All methods of ADR offer the parties options of resolving disputes without the lengthy delay of litigation. In addition, litigation wastes the parties resources on nonproductive efforts which could be better directed in a positive manner. Litigation is expensive for both parties, especially a losing party. A contractor may incur legal expenses of \$200-\$300 per hour, none of which is recoverable, unless the contractor wins the case. If the Government loses, it may be responsible for some of the contractor's attorneys fees under the Equal Access to Justice Act.

ADR is not without cost, but it does significantly reduce litigation expenses. Also, it provides that neutral third party who will reduce the adversarial bitterness and emotion that often accompanies disputes. ADR is not the cure for all disputes, but can be a valuable tool to use in selected cases.

THE PRINCIPLES OF ETHICAL CONDUCT

The following is a synopsis of general rules of ethical conduct for Government personnel. They are provided for information purposes. If an issue concerning standards of conduct or ethical conduct arises, contact your ethics counselor for advice.

A. GENERAL.

THE PRINCIPLES OF ETHICAL CONDUCT. The following principles of ethical conduct apply to all officers and employees of the executive branch and many form the basis for specific standards set forth in the regulation.

- Public service is a public trust requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.
- Employees shall not hold financial interests that conflict with the conscientious performance of duty.
- Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use to such information to further any private interest.
- An employee shall not, except pursuant to the exceptions in subpart B., solicit or accept any gift or other item of monetary value from any person or entity seeking official action, from doing business with, or conducting activities regulated by the employee's agency or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.
- Employees shall make no unauthorized commitments or promises of any kind purporting to bind the Government.
- Employees shall not use public office for private gain.
- Employees shall act impartially and not give preferential treatment to any private organization or individual.
- Employees shall not engage in outside employment or activities, including seeking or negotiating for employment that conflict with official Government duties and responsibilities.
- Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

- Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the Standards of Ethical Conduct.
- Employees are encouraged to seek the advice of agency ethics officials.

B. GIFTS FROM OUTSIDE SOURCES.

1. Basic Prohibition on Gifts from Outside Sources. An employee shall not solicit or accept a gift given because of his official position or from a prohibited source. A prohibited source is defined as any person, including any organization more than half of whose members are persons:

- Seeking official action from his agency;
- Doing or seeking to do business with his agency;
- Regulated by his agency; or
- Substantially affected by the performance of his duties.

2. Definition of a Gift. The term "gift" includes almost anything of monetary value. However, it does not include:

- Coffee, donuts and similar modest items of food and refreshments when offered other than as part of a meal;
- Greeting cards and most plaques, certificates and trophies;
- Prizes in contests open to the public;
- Commercial discounts available to the general public or to all Government or military personnel;
- Commercial loans and pensions and similar benefits;
- Anything paid for the Government, secured by the Government under Government contract, or accepted by the Government in accordance with a statute; or
- Anything for which the employee pays market value.

3. Exceptions. Subject to the limitations noted below there are exceptions which will permit an employee to accept:

- Unsolicited items with a market value of \$20 or less per occasion, aggregating no more than \$50 in a calendar year from any one source (this exception does not permit gifts of cash or investment interest). Procurement officials are limited to items with a market value of \$10.00 or less;
- Gifts when clearly motivated by a family relationship or personal friendship;
- Commercial discounts and similar benefits offered to groups in which membership is not related to Government employment or, if membership is related to Government employment, where the same offer is broadly available to the public through similar groups and certain benefits offered by professional associations or by persons who are not prohibited sources;
- Certain awards and honorary degrees;
- Gifts resulting from the outside business activities of employees and their spouses;
- Travel and entertainment in connection with employment discussions;
- Certain gifts from political organization;
- Free attendance provided by the sponsor of an event for the day on which an employee is speaking or presenting information at the event;
- Free attendance provided by the sponsor of a widely-attended gathering of mutual interest to a number of parties where the necessary determination of agency interest has been made;
- Invitations to certain social events extended by persons who are not prohibited sources, provided no one is charged a fee to attend the event;
- Certain gifts of food and entertainment in foreign areas;
- Gifts accepted by the employee under a specific statute such as 5 U. S. C. 4111 and 7342, or pursuant to a supplemental agency regulation.

4. Limitations on Use of Exceptions. An employee may not use any of the exceptions noted above to solicit or coerce the offering of a gift. An employee may not use the exceptions to accept gifts:

- For being influenced in the performance of official duties;
- In violation of any statute;

- So frequently as to appear to be using public office for private gain; or
- In violation of applicable procurement policies regarding participation in vendor promotional training.

5. Disposition of Gifts. When an employee cannot accept a gift the employee should pay the donor its market value. If the gift is a tangible item the employee may instead return the gift. Subject to approval, however, perishable items may be donated to a charity, destroyed or shared within the office.

C. CONFLICTING FINANCIAL INTERESTS.

1. Disqualifying Financial Interests. Under the criminal conflict of interest statute 18 U. S. C. 208 an employee is prohibited from participating in an official capacity in any particular matter in which to his knowledge, he or certain other persons have a financial interest if the particular matter will have a direct and predictable effect on his own or that persons financial interests.

2. Applicability. In addition to matters that affect his own financial interests this prohibition applies to particular matters that affect the financial interests of:

- The employee's spouse, minor child or general partner; or
- Any person the employee serves as officer, director, trustee, general partner or employee.
- The prohibition also applies to particular matters that affect the financial interests of a person with whom the employee is negotiating for or has an arrangement concerning future employment. However, this aspect of the statute is addressed more specifically in subpart E.

3. Disqualification. An employee is prohibited from participating in matters in which he/she has a financial interest. Participation subjects an employee to criminal penalties. Disqualification can be accomplished simply by not participating in the matter. An employee should notify the person responsible for his assignment of the need to disqualify.

4. Solutions Other Than Disqualification. Disqualification is not required if the financial interest is the subject of one of the statutory waivers described in applicable regulations or if the employee has sold or otherwise divested the conflicting interest.

5. Prohibited Financial Interests. In general employees may acquire and hold financial interests subject only to the disqualification requirement imposed by 18 U. S. C. 208. However, some agencies have statutes that prohibit employees from acquiring or holding particular interests. Agencies have the authority to issue supplemental regulation to prohibit employees from acquiring or holding certain financial interests. Agencies also may prohibit an individual employee from holding financial interests where disqualification would impair the employee's ability to perform

the duties of his position or adversely affect the agency's mission. An employee directed to divest a financial interest may be eligible for special tax treatment of the transaction.

D. IMPARTIALITY IN PERFORMING OFFICIAL DUTIES.

1. Consideration of Certain Personal and Business Relationships. Even though his disqualification may not be required under subpart C. an employee should not participate in an official capacity in certain matters without first obtaining specific authorization if, in his judgment, persons with knowledge of the relevant facts would question his impartiality in those matters.

2. Matters Covered. The matters covered include a particular matter involving specific parties if the employee knows that it is likely to affect the financial interests of a member of his household or that one of the following persons is a party or represents a party in the matter:

- A person with whom the employee has or seeks a business or other financial relationship;
- A member of the employee's household or relative with whom the employee has a close personal relationship;
- A person the employee's spouse, parent or child serves or seeks to serve as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee;
- A person the employee has in the past year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor of employee; or
- An organization other than a political party in which the employee is an active participant.

3. Disqualification. Disqualification can be accomplished in the same manner as when required under subpart C., for disqualifying financial interests.

4. Authorization to Participate. Notwithstanding the employee's determination that his impartiality would be questioned, the agency designee can authorize the employee to participate in the matter based on a determination that the Government's interest in the employee's participation outweighs the concern that a reasonable person would question the integrity of agency programs and operations.

E. SEEKING OTHER EMPLOYMENT.

1. Disqualification While Seeking Employment. An employee is prohibited from participating in an official capacity in any particular matter that, to his knowledge, has a direct and predictable effect on financial interests of a person with whom he is seeking employment. For this

purpose, "employment" means any form of non-Federal employment or business relationship involving the provision of personal services.

2. Definition of Seeking Employment. The term "seeking employment" includes bilateral negotiations with another, mutually conducted with a view to reaching an agreement regarding possible employment. It also includes conduct short of negotiations, such as sending an unsolicited resume or other employment proposal. It can include employment contacts by or through an agent or intermediary. However, it does not include simply:

- Rejecting an unsolicited employment overture;
- Requesting a job application; or
- Sending an unsolicited resume or other employment proposal to a person affected by performance of the employee's duties only as a member of an industry or other discrete class.
- Having once begun, an employee generally continues to be seeking employment until he or the prospective employer rejects the possibility of employment and all discussions end. However, an employee is no longer seeking employment with the recipient of his unsolicited resume or other employment proposal after two months have passed with no indication of interest in employment discussions from the prospective employer.

3. Disqualification. Disqualification can be accomplished in the same manner as when required under subpart C. for disqualifying financial interests.

4. Solutions Other Than Disqualification. If the employee's conduct in seeking employment amounts to negotiations the employee can participate in the matter affecting his prospective employer only if granted an individual waiver described in subpart C. If his conduct falls short of negotiations, the employee may be authorized to participate using the procedures set forth in subpart D.

5. Disqualification Based on an Employment Arrangement. An employee may not participate in a particular matter that, to his knowledge, has a direct and predictable effect on the financial interests of anyone with whom he has an arrangement concerning future employment. In this case, an employee may be able to participate in a particular matter affecting a prospective employer only if he has received an individual waiver described in subpart D. above.

F. MISUSE OF POSITION.

Use of Nonpublic Information. An employee shall not engage in a financial transaction using nonpublic information or allow the improper use of nonpublic information to further his own private interests or those of another. Information that is "nonpublic" includes information the employee knows or reasonably should know:

- Is routinely exempt from disclosure under the Freedom of Information Act or protected from disclosure by statute;
- Is designated as confidential by an agency; or
- Has not actually been disseminated to the general public and is not authorized to be made available to the public on request.

FEDERAL APPROPRIATIONS LAW

GENERAL.

This section discusses fiscal constraints involved in funding the acquisition of goods and services for the Government. This process has many statutory and administrative controls that place substantive, procedural, and administrative restrictions on the conduct of the Government's business. The purpose of this section is to provide a very basic overview of some of these controls. It is not intended to provide detailed instruction, but rather to provide guidance to help the employee spot issues concerning the proper use of appropriated funds (APF). Each requirement is unique. DSS-W's customers bear primary responsibility for ensuring that proper funds are applied to their contracts. As issues/questions arise concerning the proper use of APF, seek guidance from your fiscal officer.

The funding of contracts raises the concept of the "availability" of appropriations, which is often stated in the terms of whether APF are or are not "legally available" for a given obligation or expenditure. This is simply another way of saying that a given item is or is not a legal expenditure. Whether APF are legally available for something depends on three things:

- (1) The purpose of the obligation or expenditure must be authorized;
- (2) The obligation must occur within the time limits applicable to the appropriation; and
- (3) The obligation and expenditure must be within the amounts Congress has established.

Thus, there are three elements to the concept of availability: purpose, time, and amount. All three elements must be observed for the obligation to be legal.

AMOUNT.

The so-called Anti-Deficiency Act is actually a composite of several Public Laws (31 U.S.C. § 1341, 31 U.S.C. § 1342, AND 31 U.S.C. § 1344) in the statutory pattern by which Congress exercises its control of the public purse. The Act prohibits any officer or employee of the United States from making or authorizing an expenditure or obligation under any appropriation or fund in excess of the amount available therein or in advance of an appropriation. The DoD and military departments have augmented the statute with administrative and regulatory limitations. There are administrative and criminal sanctions that may be imposed against an individual who is found responsible for causing a violation of the Anti-deficiency Act.

PURPOSE.

One of the most fundamental statutes dealing with the use of APF is 31 U. S. C. 1301 (a): "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

Simply put this statute says that public funds may be used only for the purpose or purposes for which they are appropriated. It prohibits charging authorized items to the wrong appropriation, and unauthorized items to any appropriation. A violation of the purpose statute is not a per se violation of the Anti-deficiency Act, however, it may cause a violation.

TIME.

In exercising its constitutional powers over appropriations, Congress usually provides limits on the time period for which appropriations are available. Thus, appropriations generally fall into three categories: one-year, multiple-year, and no-year. These time limits define the period for which appropriations remain available for obligation. The funds appropriated in the annual appropriations acts are one-year funds unless the act specifically provides otherwise. A multiple-year appropriation is treated exactly like a one-year appropriation except the period of availability for obligation is extended to the period specified in the appropriation.

Contracts executed under the authority of fiscal year appropriations can be made only within the period of their obligational availability and must concern a bona fide need of the fiscal year to be charged (U. S. C. 1502(a)). Accordingly, the bona fide need concept is of great significance in determining the proper obligation of funds. The rule simply means this years funds must be used for this years needs, not another fiscal years needs. While the rule itself is fairly straightforward, the determination of what constitutes a bona fide need of a particular fiscal year depends in large measure on the facts and circumstances of the particular case.

SUPPLIES.

Generally, bona fide need is determined by when the Government actually requires (will use) the supplies being acquired. Accordingly, we obligate funds for the fiscal year in which supplies will be used. Supply needs of a future fiscal year are the bona fide need of the subsequent fiscal year, unless an exception applies. Two recognized exceptions are the lead-time exception and the stock level exception.

The lead-time exception permits the agency to consider the normal production lead-time in determining the bona fide need for an acquisition. For example, if the normal lead-time between order and delivery of an item is 45 days, an obligation for FY 95 funds is appropriate for a delivery on or before 14 November 1995. This is a bona fide need of 1995. However, if the Government permits delivery after 14 November 1995, there is no bona fide need for the item in FY 95; it is a bona fide need of FY 96.

The stock level exception permits agencies to purchase sufficient supplies to maintain adequate and normal stock levels. The Government may use current year funds to replace stock consumed in the current fiscal year, even though the Government will not use the replacement stock until the following fiscal year. For example, the Government may award a contract to maintain the normal, authorized stock levels of repair parts in February 1995 for delivery in September 1995, using FY95 funds, even if the Government knows that the Government will not use the repair parts until October 1995. Fiscal year end stockpiling of supplies in excess of normal usage requirements is prohibited.

SERVICES.

The general rule for services is that services are the bona fide need of the fiscal year in which performed. Thus service contracts may not cross fiscal years and agencies must fund service contracts with dollars available for obligation on the date the contractor performs the services. There is an exception for nonseverable services. If the services produce a single or unified outcome, product, or report, the services are nonseverable. If so, the Government may fund the effort with dollars available for obligation at the time the contract is executed, and the contract performance may cross fiscal years.

There are statutory exceptions which permit DoD to award and fund service contracts for a period not to exceed 12 months at any time during the fiscal year for the following purposes:

- maintenance of tools and facilities;
- lease of real or personal property, including the maintenance of the property, when contracted for as part of the lease agreement;
- depot maintenance;
- operation and maintenance of equipment.

A violation of the bona fide need statute may result in a violation of the Anti-deficiency Act.

Federal appropriation law is a very complex area and the principles provided above are a very basic overview intended to provide information to the user of this Guide in order that he/she can identify and raise funding issues for proper resolution.

CONTACTS WITH INDUSTRY REPRESENTATIVES

Summary. This document contains policy on contacts with industry representatives. It gives examples of contacts with industry representatives and recommended responses.

Suggested Improvements. The proponent of this document is the Office of the Chief Attorney (Acquisition), Headquarters Services, Washington. Users may send comments and suggested improvements to this office.

A. PURPOSE.

This document gives policy and procedures for Government personnel contacts with industry representatives.

B. REFERENCES.

1. U. S. C. § 423, Procurement Integrity, as implemented in FAR 3.104
2. C.F.R. Part 2635, Standards of Ethical Conduct for Employees of the Executive Branch
3. DoD 5500.7-R, Joint Ethics Regulation.
4. C.F.R. Part 286h, DoD Policy for the Release of Acquisition-Related Information

C. POLICY.

1. Only contracting officers may lawfully commit the Government in dealings with industry representatives. Government personnel should at all times:
 - a. Be familiar with applicable laws, regulations and policy regarding contacts with industry personnel.
 - b. Avoid situations that could adversely affect the integrity of the Government contracting process.
 - c. Avoid situations that could result in unauthorized commitments.
2. Personnel must avoid contacts with industry (for example, interviews, demonstrations, tests, briefings) that favor or appear to favor one industry representative (firm or company) over another.
3. When contact with industry is necessary or unavoidable, Government personnel will:
 - a. Coordinate, in advance, with the appropriate program or project manager to determine whether or not the proposed contact is suitable or beneficial to the particular program, project, or

product. If the program, or project manager is not known, consult with DSS-W before continuing the contact.

b. Refer the industry representative to the appropriate program manager or functional proponent.

c. Ensure that the contact is only for obtaining mission-essential information unavailable from Government sources.

d. Do nothing to create the appearance of impropriety favoring one industry representative (firm or company) over another.

e. Ensure one industry representative (firm or company) is not given a competitive advantage.

f. Be aware that former military and civilian personnel are subject to conflict of interest prohibitions in dealing with U. S. Government acquisitions. Ensure that sufficient information is obtained from company or industry representatives concerning their prior association with the Government in general and DoD in particular to ensure that their participation in the meeting will not violate post-Government employment restrictions (see Figure B-5).

g. Ensure information about prospective acquisitions is not released without the approval of a contracting officer.

4. Examples of contacts with industry representatives and appropriate responses are shown elsewhere in this Part. Personnel must use good judgment when dealing with industry representatives.

D. REQUIRED CONTACTS.

1. Market Surveys.

a. Market surveys are essential tools for communicating with industry to maximize competition and are used as attempts to determine if other qualified sources exist that are capable of satisfying a Government requirement.

b. The requiring activity is responsible for performing the initial market survey for their requirement. This may be done in close coordination with contracting personnel. Table 1 lists types of market surveys and the person responsible for performing the survey.

Table 1

Market Surveys

Type of Market Survey**Responsible Person**

Telephone	Program or Project Manager
Research of manufacturer's literature	Program or Project Manager
Visit to trade shows	Program or Project Manager
Sources sought in trade journals	Program or Project Manager
Query to other Government agencies on same/ similar buys	Program or Project Manager or Contracting Officer
Solicitation for planning purposes	Contracting Officer
Synopsis in the Commerce Business Daily	Contracting Officer
Query to Defense Contract Administration service activities	Contracting Officer

c. To prevent problems or improprieties, Government personnel will not:

(1) Ask for firm price quotes or technical proposals. However, it is acceptable to ask for catalogs and published price lists.

(2) Discuss an entire project. Personnel may discuss only relevant portions. In-depth discussions provide the industry representative (firm or company) with an unfair advantage on future solicitations.

(3) Allow the industry representative marketing effort to influence the actual minimum need of the Government.

(4) Allow the industry representative to prepare a statement of work or specification. Government personnel should know their needs. When an industry representative prepares the specification or statement of work, there is a significant risk of an improperly restrictive requirement.

(5) Talk only with one industry representative (firm or company). This defeats the whole purpose of a market survey.

(6) Provide or discuss Government cost estimates or budgets with industry representatives.

(7) Make statements that could be construed as a commitment of the Government.

(8) Provide letters of intent to industry representatives.

(9) Accept on-site demonstrations and briefings, or the loan of equipment or services for test and evaluation, except in accordance with the procedures set forth in this document.

2. Presentations, On-site Demonstrations, and Briefings: Industry presentations permit the interchange of technical information and provide the opportunity for Government personnel to update their knowledge of the state of the art for communications, electronic, tactical, and computer equipment. Industry representatives, regardless of past or present affiliations, will not be permitted to conduct presentations, on-site demonstrations, or briefings without going through the appropriate program or project manager. If the program or project manager is not known, or if unresolved questions occur regarding the appropriateness of such contact, personnel will consult with DSS-W contracting personnel and the cognizant legal office before continuing with the contact.

a. When notified that an industry representative wants to make a presentation, demonstration or briefing, the program manager will ask the representative for a formal written request. The request will contain all available information on the product or service to be addressed, and include completed Government Business Visitor Registration forms for each company or industry representative who plans to attend (see Figure B-5). Only those representatives who have completed this form indicating that their participation will not violate post-Government employment restrictions may attend.

b. On receipt of the request from the industry representative, the program manager will coordinate with a knowledgeable person in the organization to determine whether or not the presentation, demonstration, or briefing is needed. If little benefit would be derived from a presentation, demonstration or briefing, the program manager will advise the industry representative by return mail. If the presentation, demonstration or briefing will be beneficial to the Government, the program manager will:

(1) Make the necessary entry on the industry presentation roster. Figure B-1 is an industry presentation roster format. Information will be entered in the order it is received.

(2) Arrange for a facility to accommodate the presentation, demonstration or briefing, including necessary support items (for example, audiovisual support, chalkboard, easel).

(3) Submit the Government Business Visitor Registration forms to the Ethics Counselor in the Office of the Chief Attorney (Acquisition), Headquarters Services, Washington, for review to ensure the participation of the company or industry representatives will not violate the post-Government employment restrictions.

(4) Prepare a letter of agreement for the signature of the DSS-W contracting officer. Figure B-2 is the format for a letter of agreement.

(5) On receipt of the letter of agreement (signed by the industry representative), prepare an informal memorandum advising interested personnel of the date, time, and location of the presentation, demonstration or briefing. Figure B-3 contains a notification format.

3. Test and Evaluation of Equipment and Systems. Equipment and systems tests and evaluations are prohibited without a current agreement of license signed by the industry representative and the Government contracting officer. The program manager will prepare:

a. An agreement and license instrument to be executed by an authorized industry representative and the Government. The industry representative will be an individual with commitment and obligation authority. The Government will be represented by the contracting officer. Every Agreement and License must be reviewed and approved by legal counsel and signed by a contracting officer prior to execution. Figure B-4 contains the format for an agreement and license instrument.

b. A memorandum for the contracting officer's signature to send the agreement and license to the industry representative. The memorandum will be prepared in an original and 3 copies and accompanied by a copy of the agreement and license. Copies will be distributed as follows:

(1) Industry representative (original and Copy 1)

(2) Servicing legal office (copy 2).

(3) Contracting office representative (copy 3).

E. POINTS OF CONTACT. Questions or conflicts should be brought to the attention of the:

1. Office of the Principal Assistant Responsible for Contracting, Defense Supply Services-Washington.

2. Office of the Chief Attorney (Acquisition), Headquarters Services, Washington.

APPENDIX A

EXAMPLES OF CONTACTS WITH INDUSTRY REPRESENTATIVES AND APPROPRIATE RESPONSES

1. **Contact:** A prospective contractor tries to persuade a program manager that there is a need for a particular product. Having persuaded the PM of the need, the prospective contractor helps develop the specification or statement of work ensuring that the plan requires the product the contractor intends to sell. In some cases, a prospective contractor will develop sole source justification and prepare, e.g., a DA Form 1262 (Purchase Request and Commitment).

Response: The Inspector General, Department of Defense, has identified actions of this type as potentially fraudulent. At minimum, such practices create apparent Organizational Conflicts of Interest. (See FAR 9.5) These actions also lead to favoritism and unfair competition advantages. This type of situation must not be allowed.

2. **Contact:** A computer firm sends a questionnaire asking for information on computer equipment in use or planned for purchase. The questionnaire also asks for names of vendors of the equipment.

Response: Responding to this type of questionnaire could create a competitive advantage for the originator and cause security problems. The questionnaire must not be answered.

3. **Contact:** A retired colonel who represents a firm writes a general officer and interests that general officer in the firm's high technology systems. The representative offers to demonstrate the system to subordinate commanders.

Response: The proper response for the solicited officer is to refer the representative to the appropriate program or project manager, who will arrange for authorized briefings or demonstrations (this Pam, para. E.1.d). A second issue is the question of whether or not to deal with a retired military person selling to the Government. When a situation like this occurs, your Ethics Counselor should be contacted for advice.

4. **Contact:** A firm issues an apparently official document to ordering offices. The document concerns logistic support, product preferences and availability, and ordering information. Nothing on the document reveals that it is merely a sales offering and is not official guidance or policy.

Response: This type of document should be brought to the attention of the appropriate program or project manager and should not be sent to requiring activities.

5. **Contact:** A Government employee receives an invitation to attend a trade fair or demonstration of equipment.

Response: Government personnel may attend events that are of mutual interest to the Government and industry, open to the general public and sponsored by associations rather than individual contractors. Personnel should avoid events sponsored by individual contractors.

6. Contact: While attending a trade fair (as above), Government personnel are asked to be photographed in front of a certain kind of word processing equipment.

Response: Personnel should refuse to be photographed in this situation because the picture may be viewed as evidence that the Government endorses the product. This can create an unfair competitive advantage and an appearance of favoritism.

7. Contact: An industry representative of a current contractor continually visits users, attempting to sell equipment for expansion or update. Many times the user does not have the expertise to determine if the expansion or update is feasible or necessary.

Response: The user should advise the industry representative that contact at the user level should be minimal and direct the representative to the appropriate program manager. The program manager can evaluate the recommendations and determine what is in the best interest of the Government. Also, this approach will minimize disruption of the user's work environment.

8. Contact: A contractor conducting a study contract for a DoD activity wishes to bid for a contract involving another DoD activity. The contractor's contract manager is a military retiree of high rank. To gain internal personnel and budget information for preparing the bid for the other DoD activity, the contract manager seeks assistance from the contracting officer's representative.

Response: This is a case of unfairly seeking competitive advantage through a past position, seeking access to nonpublic and procurement sensitive information, and may involve a violation of the Procurement Integrity law. If such a contact occurs, the COR must report it to the contracting officer responsible for the procurement who will coordinate the matter with the responsible Procurement Fraud Advisor and Ethics Counselor. Finally, if the officer was retired within the last two years, the COR should inform his or her own contracting officer and Ethics Counselor to ensure that the retiree's contract management does not violate post-Government employment restrictions.

9. Contact: A high technology firm submits an unsolicited proposal to a DoD activity to "retrofit" Government owned electronic equipment with the most modern version available. The firm plans displays and orientations at various locations to sell its equipment.

Response: The activity should send the unsolicited proposal to DSS-W for evaluation and response. Coordination between DSS-W and the program manager will determine the need for demonstrations.

10. Contact: A firm currently has one or more contracts with Department of Defense activities and is thereby afforded the access to Government personnel that contract seekers do not have.

Response: Government personnel must ensure that discussions, briefings, demonstrations, and other contacts that involve a contractor are limited to subjects within the scope of the current contract or contracts. Contractors must not be allowed to use an existing contract as a vehicle to present and promote new products or contractual services that are not available under the existing contract.

11. Contact: An industry representative offers to let a DoD organization borrow a piece of equipment, without charge, on a trial basis.

Response: The program manager should advise the representative of the procedures outlined in paragraph E.1.e. If the representative is agreeable and the organization determines the need for test and evaluation of equipment, the program manager will take appropriate action.

12. Contact: An industry representative offers to have an on-site presentation or briefing on the firm's equipment.

Response: The program manager will advise the representative that the offer must be in writing, provide the appropriate form (fig B-1), and follow procedures in paragraph E.

APPENDIX B

CORRESPONDENCE WITH INDUSTRY REPRESENTATIVES

This appendix contains sample formats for correspondence with industry representatives as follows:

- a. Fig. B-1, Sample Format for Industry Presentation Roster.
- b. Fig. B-2, Sample Format for Letter to Industry Representative.
- c. Fig. B-3, Sample Format for Announcement of Presentation.
- d. Fig. B-4, Sample Format for Agreement and license.
- e. Fig. B-5, Business Visitor Registration Form

Figure B-1 - Sample Format for Industry Presentation Roster

INDUSTRY PRESENTATION ROSTER

INITIAL CONTACT:

Name of Representative: _____ Date: _____

Company Name: _____ Phone Number _____

Company Address: _____

Representatives: _____
(Name of persons making presentations)

Subject: _____
(What will be covered in the presentation)

Scheduled for: Date _____ Time: _____
(Start and End)

Location: _____
(Building and room number where presentation will be made)

Equipment Requested (check blocks): ☐ View-Graph ☐ Front/Rear Projector
☐ Chalkboard ☐ Easel
☐ 35mm Projector
☐ Other: _____

* * * * *

ACTUAL PRESENTATION

Introduction Made By: _____

Presentation Made By: _____

Length of Presentation: _____ (Hours and Minutes)

Number of Attendees: _____ (attach roster)

Comments (may be attached):

Figure B-2 - Sample Format for Letter to Industry Representative

(Agency Letterhead)

(leave date blank)

Office of (appropriate program manager)

(Industry representative address as shown on the industry presentation roster)

Dear (applicable salutation):

The presentation you propose to give on (date) at (location) concerning (subject from industry presentation roster) is authorized upon acceptance of the following conditions:

- There will be no cost to the U. S. Government (the Government will pay no charges, costs, or expenses in connection with the presentation).
- No claim will be made against the U. S. Government by you or anyone with whom you are associated in conjunction with the presentation.
- The U. S. Government will not furnish a test or evaluation report as a result of the presentation.
- The U. S. Government will assume no responsibility or liability for damage to, or destruction of, any equipment provided by you or your firm in support of the presentation.
- You will not use any information from or reference to this presentation for advertising purposes, to include the fact that the U. S. Government approved, authorized, or permitted the presentation.
- The U. S. Government's approval and authorization to permit this presentation will in no way obligate the U. S. Government to purchase any materials or services from your firm.

Arrangements have been made for your presentation on the aforesaid date in room (number) of (building number or name). Limited support items (for example, audiovisual) may be provided if requested.

Please indicate your agreement to the conditions in this letter by signing it and returning it to (return address).

Sincerely,
(contracting officer signature block)

Figure B-3 - Sample Format for Announcement of Industry Presentation.

(Office symbol)

Office of the Program Manager

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Industry Presentation of (insert industry name)

1. Representatives of (industry name) will visit (location) on (date). They will conduct a presentation at (time) in (location).
2. The presentation will cover (subject on industry presentation roster) The presentation will last approximately (scheduled length).
3. All interested persons are invited to attend.

(Signature block of program manager)

DISTRIBUTION:
(interested activities)

Figure B-4 - Sample Format for Agreement and License.

AGREEMENT AND LICENSE

This agreement and license is made as of the ____ day of _____, 19____, by and between (name of licensor) (hereafter licensor) and the United States of America (hereafter licensee).

Whereas, licensor agrees to provide the following listed and described equipment to licensee for testing and evaluation purposes:

1. [Describe equipment here, listing equipment serial numbers when available.]
2. Testing shall basically consist of:
3. [Be as specific as possible, consistent with clarity.]
4. Evaluation shall basically consist of:
5. [Explain or describe what is intended to be derived or achieved from the testing effort.]

It is further agreed as follows:

1. Licensor grants consent to licensee to use the above described equipment for testing purposes as herein stipulated for the explicit purpose of evaluation. Licensor conveys no title to any equipment herein described, and licensee shall acquire no ownership rights or other entitlement. Licensee shall not interface or connect any equipment furnished by licensor to equipment or configured systems without the express written consent of the licensor. Such consent may be accomplished by addendum to this agreement. Modifications to equipment provided for testing purposes shall be accomplished only by the licensor, unless otherwise explicitly authorized by addendum to this agreement.

2. Demonstrations, product displays and 'gratuitous' services are conducted for the sole purpose of demonstrating the capability of particular items or services and not for fulfilling mission requirements for an interim time frame. The examination and demonstration of items of services will in no way, expressed or implied, obligate the licensee to purchase, rent or otherwise acquire the items demonstrated, displayed or furnished.

3. The licensee assumes no cost or obligation, expressed or implied, for damage to, destruction of, or loss of any licensor provided components.

4. The licensor agrees to be liable for and to hold the licensee harmless from any damages to property or injuries to any persons resulting from the use of the item or services provided for the demonstration.

5. The licensor agrees to reimburse the licensee for any damage to Government owned property resulting from the demonstration.

6. All software, all equipment and hardware supplied by licensor, software media, whether microfiche, paper, magnetic tape, disk, floppy disk, or other reproduction, shall at all times remain the property of licensor. The licensor is responsible for marking any restricted or limited use software provided to licensee in conjunction with tests and evaluations accomplished under this agreement.

7. Licensee shall provide all test site facilities and utilities which are required for any and all tests to be accomplished pursuant to this agreement.

8. Licensor shall be responsible for all transportation of equipment provided by licensor in conjunction with tests and evaluations under this agreement to and from the initial test site. Licensee shall incur no costs for transportation of equipment provided by the licensor under this agreement.

9. In return for the opportunity to demonstrate the capabilities of its equipment, the licensor agrees not to file any claims against the licensee or the US Government, or otherwise seek any form of reimbursement for the use or compensation for the loss, damage to or destruction of any equipment, materials, supplies, information or services provided to the licensee for the demonstration.

10. Licensee shall at all times protect and safeguard information that the licensor has identified as proprietary, confidential in nature, or as a licensor's trade secret.

11. The licensor will not use any information from or reference to tests and evaluations from provisions of this agreement for advertising purposes, to include the fact that the licensee permitted, conducted or participated in the respective tests and evaluations.

12. The release of information or data generated as a result of tests and evaluations conducted under provisions of this agreement to the licensor, shall be the sole and unilateral decision of the licensee. The licensee shall not release information or data generated pursuant to this agreement outside the U. S. Government without the express written consent of the licensor.

13. The Contracting Officer is the only duly authorized representative of the licensee for the purposes of this agreement.

IN WITNESS WHEREOF, the parties hereto have executed this agreement and license as of the date first above written.

LICENSEE:

LICENSER:

BY: _____

BY: _____

TITLE: _____

TITLE: _____

Approved for legal sufficiency.

BY: _____

BY: _____

TITLE: _____

TITLE: _____

DATE: _____

DATE: _____

Figure B-5 - Business Visitor Registration

BUSINESS VISITOR REGISTRATION

1. Name: _____

2. Representing: _____

3. Purpose of visit/contact: _____

4. Are you a former officer or employee of the U. S. Government?

☐ no (skip all items and sign) ☐ yes (continue below)

5. List positions held during last 2 years of Government service:

<u>Dates</u>	<u>Grade</u>	<u>Title</u>

6. Date of latest termination of Government service (d/m/y)

(If less than 1 year ago, continue below)

(If less than 2 and 3 years ago, skip to item 9)

(If more than 3 years ago, skip to item 12)

7. (1 YR.) Were you a "Senior employee" (i.e., Military officer above 0-6; civilian paid at Executive Schedule Level V or higher)?

☐ No (continue below)

☐ Yes (see ethics counselor about 18 U.S.C. 207(c))

☐ Not sure (ask ethics counselor to check federal register)

8. (2 yrs) Does the subject of your visit relate to a matter for which you were officially responsible during your Government service?

☐ No (continue below)

☐ Yes (see ethics counselor about 18 U.S.C. 207(a)(2))

9. (3 yrs) Are you a retired military officer with 20 or more years duty?

☐ No (skip to item 12)

☐ Yes (if retired less than two years, continue with item 10; if between two and three years, skip to item 11.)

10. (2 yrs) Is your purpose for this visit (or that of any companion) concerned in any way whatsoever with a contract or with the ultimate sale or anything (goods or services) to DoD (e.g., determining future DoD requirements, product demonstrations, or capabilities briefings)?

☐ No (continue below)

☐ Yes (see ethics counselor about 18 U.S.C. 281)

11. (3 yrs) Is your purpose for this visit (or that of any companion) concerned in any way whatsoever with a contract or with the ultimate sale of any tangible goods to any part of DoD (e.g., determining future DoD requirements, product demonstrations, or capabilities briefings)?

☐ No (continue below)

☐ Yes (see ethics counselor about 37 U.S.C. 801(b))

12. (all) Does the subject of your visit relate to a matter on which you personally and substantially took some official action during your Government service?

☐ No (continue below)

☐ Yes (see ethics counselor about 18 U.S.C. 207(a)(1)).

13. If you answered "yes" to one or more of questions #7 through #12, your participation in the proposed contract could violate a federal criminal statute. You are encouraged to discuss the matter with your ethics counselor (the ethics counselor assigned to the command or organization from which you left Government service). You will not be able to participate in the proposed contact until the matter is resolved with the headquarters services ethics counselor, the chief attorney (acquisition).

14. Signature: _____ Date: _____

PROCUREMENT INTEGRITY

[PROCUREMENT INTEGRITY RULES ARE UNDER REVISION. IMPLEMENTATION OF NEW RULES IS EXPECTED IN JANUARY 1997. CONSULT YOUR ETHICS COUNSELOR FOR CHANGES. THIS SECTION WILL BE REVISED AS SOON AS NEW RULES ARE PUBLISHED.]

This section highlights the statutory requirements of the Office of Federal Procurement Policy Act (41 U. S. C.), as amended by section 814 of the FY 90/91 National Defense Authorization Act, Pub. L. 101-189, and section 815 of the 1991 National Defense Authorization Act, Pub. L. 101-1=510 (hereinafter section 27 is referred to as “the Act” or “the law as amended”). 41 U. S. C. 423, the "procurement integrity" statute applies to all employees and officers of the U. S. that are procurement officials.

"Procurement official" means any civilian or military official or employee who has participated personally and substantially in any of the following:

- (i) Drafting a specification or statement of work for that procurement;
- (ii) Review and approval of a specification or statement of work developed for that procurement;
- (iii) Preparation or development of procurement or purchase requests for that procurement;
- (iv) The preparation or issuance of a solicitation for that procurement;
- (v) Evaluation of bids or proposals for that procurement;
- (vi) Selection of sources for that procurement;
- (vii) Negotiations to establish the price or terms and conditions of a particular contract or contract modification; or
- (viii) Review and approval of the award of a contract or contract modification;

FAR 3.104-3 Statutory Prohibitions and Restrictions.

As provided in section 27 of the Act, the following conduct is prohibited:

(a) Prohibited conduct by competing contractors. During the conduct of any Federal agency procurement of property or services no competing contractor or any officer, employee, representative, agent, or consultant of any competing contractor shall knowingly--

- (1) Make, directly or indirectly, any offer or promise of future employment or business opportunity with, any procurement official or such agency except as provided in (FAR) 3.104-6(b);

(2) Offer, give, or promise to offer or give, directly or indirectly, any money, gratuity, or other thing of value to any procurement official of such agency; or

(3) Solicit or obtain, directly or indirectly, from any officer or employee of such agency, prior to the award of a contract any proprietary or source selection information regarding such procurement.

(b) Prohibited conduct by procurement officials. During the conduct of any Federal agency procurement of property or services, no procurement official of such agency shall knowingly--

(1) solicit or accept, directly or indirectly, any promise of future employment or business opportunity from, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any officer, employee, representative, agent, or consultant of a competing contractor, except as provided in (FAR) 3.104-6(a);

(2) ask for, demand, exact, solicit, seek, accept, receive, or agree to receive, directly or indirectly, any money, gratuity, or other thing of value from any officer, employee, representative, agent, or consultant of any competing contractor for such procurement; or

(3) disclose any proprietary or source selection information regarding such procurement directly or indirectly to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

(c) Disclosure to unauthorized persons. During the conduct of any Federal agency procurement of property and services, no person who is given authorized or unauthorized access to proprietary or source selection information, regarding such procurement, shall knowingly disclose such information, directly or indirectly, to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

(d) Employees who are or were procurement officials.

(1) No individual who while serving as an officer or employee of the Government or member of the Armed Forces, was a procurement official with respect to a particular procurement may knowingly--

(i) Participate in any manner, as an officer, employee, agent, or representative of a competing contractor, in any negotiations leading to the award, modification, or extension of a contract for such procurement; or

(ii) Participate personally and substantially on behalf of the competing contractor in the performance of such contract.

The restrictions in subdivisions (d)(1)(i) and (d)(1)(ii) of this subsection apply during the period ending 2 years after the last date such individual participated personally and substantially in the conduct of

such procurement or personally reviewed and approved the award, modification, or extension of any contract for such procurement.

(2) This subsection does not apply to any participation referred to in subdivisions (d)(1)(i) and (d)(2)(ii) of this subsection with respect to a subcontractor who is a competing contractor unless--

(i) The subcontractor is a first or second tier subcontractor and the subcontract is for an amount that is in excess of \$100,000; or

(ii) The subcontractor significantly assisted the prime contractor with respect to negotiation of the prime contract; or

(iii) The procurement official involved in the award, modification, or extension of the prime contract personally directed or recommended the particular subcontractor to the prime contractor as a source for the subcontract; or

(iv) The procurement official personally reviewed and approved the award, modification, or extension of the subcontract.

FAR 3.104-5 Disclosure, protection, and marking of proprietary and source selection information.

(a) Except as specifically provided for in this subsection, no person or other entity may disclose proprietary information or source selection information to any person other than a person authorized by the Head of the Agency to receive such information. A person or entity who does not know if information is proprietary or source selection information, or does not know if the person or entity may disclose or receive such information, shall make the inquiries prescribed at 3.104-8(d).

(b)(1) Proprietary and source selection information shall be protected from unauthorized disclosure in accordance with 14.401, 15.411, 15.413, applicable law, and agency regulations.

(2) Information contained in a bid or proposal that bears the legend required by 3.104-4(j)(2) shall be considered to be proprietary information for purposes of the Act. However, information contained in a bid or proposal that does not bear that legend shall remain subject to the restrictions on disclosure contained in 15.413, 15.509, 24.202, or as otherwise required by law.

FAR 3.104-6 Restrictions on employment or business opportunity discussions between competing contractors and procurement officials

(a) Applicability to procurement officials. During the conduct of a Federal agency procurement, subsection 27(b)(1) of the Act prohibits an individual who has become a procurement official from knowingly, directly or indirectly, soliciting or accepting from or discussing with any officer, employee, representative, agent, or consultant of a competing contractor, future employment or business opportunity. Subsection 27(b)(1) of the Act also applies to individuals acting as procurement officials on behalf of the procuring agency who are, or are employed by contractors, subcontractors,

consultants, experts, or advisors (other than employees of a competing contractor). The prohibition in subsection 27(b)(1) does not apply to a procurement official --

(1) After the contract has been awarded, the procurement canceled, or the contract modification executed;

(2) After the procurement official leaves Government service;

(3) Who is, or is employed by, a contractor, subcontractor, consultant, expert, or advisor, after such procurement official ceases to act on behalf of, or provide advice to, the procuring agency concerning the procurement;

(4) Described in paragraph (c) of this subsection who has received written authorization for recusal from further participation in a procurement, and who has in fact discontinued participation in the procurement.

(5) Whose only communication with a competing contractor is for the purpose of--

(i) Rejecting an unsolicited offer of employment or business opportunity; or

(ii) Advising the competing contractor that he or she must seek recusal in accordance with paragraph (d) of this subsection prior to any discussions regarding the unsolicited offer. A procurement official who wishes to conduct such discussions with the competing contractor shall promptly submit a recusal proposal.

(b) Applicability to competing contractors. During the conduct of a Federal agency procurement, subsection 27(a)(1) of the Act prohibits a competing contractor from knowingly, directly or indirectly, offering or promising to, or discussing with, a procurement official any future business or employment opportunity. The prohibition does not apply to--

(1) An initial contact for the sole purpose of determining whether an individual or other entity is able to engage in discussions concerning future employment or business opportunity either because the individual or entity has been recused or is not a procurement official.

(2) A contact or discussion with an individual or other entity who may engage in such contact or discussion under subparagraphs (a)(1) through (a)(4) of this subsection.

(c) Eligibility for Recusal. An individual or other entity who is a procurement official may be eligible for recusal if the individual or entity has not participated personally and substantially in--

(1) The evaluation of bids or proposals, the selection of sources, or the conduct of negotiations in connection with such solicitation or contract during the period beginning with the issuance of a procurement solicitation and ending with the award of a contract or cancellation of the procurement; or

(2) The evaluation of a proposed modification, or the conduct of negotiations during the period beginning with the negotiation of a modification of a contract and ending with an agreement to modify the contract or a decision not to modify the contract.

(d) Recusal proposal. An eligible procurement official who wishes to discuss future employment or business opportunities with a competing contractor during the conduct of a procurement shall submit to the Head of the Contracting Activity (HCA), or his or her designee, prior to initiating or engaging in such discussions, a written proposal of disqualification from further participation in the procurement which relates to that competing contractor. Concurrent copies of the written proposal shall be submitted to the contracting officer, the Source Selection Authority if the contracting officer is not the Source Selection Authority, and the procurement official's immediate supervisor. As a minimum, the proposal shall--

(1) Identify the procurement involved;

(2) Describe the nature of the procurement official's participation in the procurement and specify the approximate dates or time period of participation;

(3) Identify the competing contractor and describe his interest in the procurement.

(e) Suspension from participation in a procurement. The contracting officer, or the Source Selection Authority if the contracting officer is not the Source Selection Authority, may suspend the individual's or entity's participation in the procurement pending evaluation of the recusal proposal. Notwithstanding submission of a recusal proposal or suspension from participation in a procurement, an individual or entity shall not solicit or engage in discussions of employment or business opportunity until authorized in writing by the HCA or his or her designee.

FAR 3.104-7 Post-employment restrictions applicable to Government officers and employees serving as procurement officials and certifications required from procurement officials leaving Government service.

(a) Subsection 27(e)(4) of the Act provides that if a procurement official leaves the Government during the conduct of a procurement expected to result in a contract or modification in excess of \$100,000, such official shall certify to the contracting officer that he or she understands the continuing obligation, during the conduct of the procurement, not to disclose proprietary or source selection information related to such agency procurement. This certification requirement applies to individuals acting as procurement officials on behalf of the procuring activity who are, or are employed by contractors, subcontractors, consultants, experts, or advisors other than employees of the competing contractor when such individuals, during the conduct of the procurement, cease to function as procurement officials for the procurement.

(b) Subsection 27(f)(1)(A) of the Act restricts a current or former Government officer or employee, as defined in 3.104-4(d), who was a procurement official with respect to a particular procurement, from knowingly participating in any manner in negotiations as an officer, employee, representative, agent, or consultant of a competing contractor leading to the award or modification of

the contract for such procurement. This restriction not only includes representing the competing contractor in negotiations with the contracting activity, but also includes providing advice or information for the specific purpose of influencing negotiation strategies. For purposes of this restriction, "negotiation strategies" mean the contractor's approach to the preparation and presentation of its offer or the conduct of negotiations with the Government. This restriction does not apply to providing scientific, technical, or other advice that is unrelated to negotiation strategies. This restriction lasts for two years from the date of the individual's last personal and substantial participation in the Federal agency procurement.

(c) Subsection 27(f)(1)(B) of the Act restricts a current or former Government officer or employee, as defined in 3.104-4(d), who was a procurement official with respect to a particular procurement, from knowingly participating personally and substantially on behalf of the competing contractor in performance of the contract. To participate "personally and substantially" requires the presence of both direct and significant involvement in the performance of the specific contract. The performance of general engineering, scientific, or technical work, or providing general budgetary or policy advice, shall not be considered personal and substantial participation on behalf of a competing contractor in the performance of the contract for which the Government officer or employee is or was a procurement official. Where participation is on behalf of a competing contractor who is a subcontractor, the significance of that participation will be determined in relation to the prime contract. This restriction lasts for 2 years from the date of the last personal and substantial participation in the Federal agency procurement.

(d) The restrictions in (b) and (c) of this subsection do not apply to--

(1) Individuals acting as procurement officials on behalf of the procuring agency who are or were, or who are or were employed by contractors, subcontractors, consultants, experts, or advisors and who are not Government officers or employees as defined in 3.104-4(d).

(2) Participation in the negotiation or performance of any other contract of the competing contractor.

(3) General scientific and technical work on an independent research and development project, unless such work involves the negotiation or performance of a specific contract that the individual worked on as a Government employee.

(4) Participation with respect to a subcontractor who is a competing contractor unless--

(i) The subcontractor is a first or second tier subcontractor and the subcontract is for an amount that is in excess of \$100,000; or

(ii) The subcontractor significantly assisted the prime contractor with respect to negotiation of the prime contract; or

(iii) The procurement official involved in the award or modification of the prime contract personally directed or recommended the particular subcontractor as a source for the subcontract; or

(iv) The procurement official personally reviewed and approved the award or modification of the subcontract. A contracting officer's consent, in accordance with part 44, to the placement of a subcontract or with respect to architect-engineer contracts, the substitution of a subcontractor, associate, or consultant, does not constitute approval of the subcontract, subcontractor, associate, or consultant. Similarly, approval of a contractor's purchasing system does not constitute approval of a particular subcontract or subcontractor.

The information provided above is not a full compendium of information on Procurement Integrity. It is provided as general information. If you have a question or need clarification, contact your servicing contracting officer.

PROCUREMENT PROTESTS

A. Introduction.

1. In issuing a solicitation or selecting a contractor for award, the Government is required to comply with applicable statutes, regulations and the solicitation's evaluation/award process. The courts have long recognized that in consideration for submission of a bid or proposal by prospective contractors, the Government is under a legal obligation to treat each potential contractor fairly.

2. Additionally, prospective contractors and unsuccessful bidders have been accorded under the Competition in Contracting Act of 1984, the statutory right to challenge a solicitation and/or award decision. If a solicitation or award decision is successfully challenged, the protest may have a significant impact on the acquisition process to include delays in acquiring the goods or services, potential termination costs, the awarding of the protester's attorney fees, litigation costs and bid and proposal costs. In some cases these costs can exceed the cost or value of the proposed contract. Therefore, it is essential that the acquisition be conducted properly and that Government evaluations and award decisions be reasonable, well supported and accurately documented.

B. Protest Defined.

1. A protest is a written objection filed with either the agency, the General Accounting Office (GAO), or a federal court, by a potential bidder or unsuccessful offeror challenging the terms or conditions contained in a solicitation; the cancellation of a solicitation; or an award or proposed award of a contract. A protest unlike a contracts dispute, focuses on contract formation controversies rather than on the post award contract performance disputes raised by the contractor who is performing the contract.

2. Typically, in a timely protest against the terms of a solicitation, the prospective bidder or offeror may allege for example, that the solicitation requirements are contrary to statutes or regulations, or are overly restrictive of competition, or exceed the Government's minimum needs, or that the solicitation is vague or that the selected contracting method or type is inappropriate.

3. In a protest against the contract award decision, a protester may allege for example, that the agency awarded the contract to an unresponsive bidder, or in a negotiated procurement to a technically unacceptable offeror. Also, in a negotiated procurement a protester may allege that the agency failed to conduct meaningful discussions, or that the technical and cost evaluations were improperly conducted. In a best value negotiated acquisition, the protester may further allege for example, that the Government failed to conduct a proper cost/price analysis and that the technical/cost trade-off was unreasonable.

C. Debriefing Unsuccessful Offerors.

1. Unsuccessful bidders or offerors may initiate a post award protest as a result of obtaining information contained in the Notice of Award letter, or under a Sealed Bid solicitation from information available during the public bid opening process. In a best value negotiated acquisition the unsuccessful offeror is provided information during a requested post award debriefing. Additionally, information released as a result of a Freedom of Information Act (FOIA) request may also serve to raise a protest allegation. In short, the potential protester initially has these legal opportunities to obtain information to verify whether the acquisition was conducted properly and confirm that they were treated fairly. Nonetheless, care must be exercised to insure that proprietary information, classified information or unauthorized procurement source sensitive information is not disclosed nor released.

2. Under the Federal Acquisition Streamlining Act of 1994, unsuccessful offerors must be extensively debriefed within five days after they have requested, in writing, a debriefing. Failure to provide the requested debriefing will, in the event of a protest, extend the potential for suspension of performance under the protested contract. Suspension of contract performance essentially prevents the selected contractor from performing the contract requirements until a formal decision on the protest is issued. The technical and contracting personnel must therefore plan and be prepared to provide debriefings upon written requests to any unsuccessful offeror immediately after the contract award is made.

D. Protest Procedures.

1. A protester may elect among one of several forums to challenge a solicitation or award decision. A protest to the agency may be subsequently filed with the GAO, or a federal court for further review. A protest filed with the GAO, or a federal court will result in a fast pace litigation process requiring on a priority basis, dedicated technical, contracting and legal resources. To avoid the impact and costs of a successful protest, the agency must carefully and expediently review the protest allegations and timely respond in detail with a persuasive agency rebuttal, as well as providing the complete supporting agency record. In some cases where the agency's actions are indefensible, immediate corrective actions through re-evaluating the proposals, or amending or canceling the solicitation will be necessary to resolve a protest.

2. Procedurally, the agency will be required within just a couple of weeks or less from the date of filing the protest, to provide a complete agency administrative record to the protested forum (GAO or Court) for their independent review. Additionally, under protective orders, Attorneys and Experts for the protester will also receive a complete copy of the agency record and may further challenge other discovered errors contained in the record. The agency must also provide a written factual answer detailing the agency's rebuttal to the protest allegations. The initial burden will be on the agency to show through the documents contained in the administrative report, that the protest is without merit and should be denied.

3. In addition to review of the agency's administrative record, a protester may also obtain additional information under the discovery process. Furthermore, agency witnesses must be prepared to testify and be cross examined at a Court or a GSBCA hearing.

4. As a result of discovery and review of the agency's record, the protester may further make comments contesting the agency's record, amend the protest allegations to include raising new or additional protest grounds. Unless these comments or new allegations are dismissed as untimely, the agency will have to respond to these comments or new protest allegations with additional rebuttals, relevant documents and statements.

5. Depending on the protest forum, a written public decision on a protest will generally be issued within two to four months from the date the protest was filed. Each protest forum applies different standards in reviewing the agency's actions and arriving at a decision. For example, as long as the agency establishes in its record submission a rational basis for its actions or decisions, the GAO will defer to and allow the agency some reasonable discretion. Federal Courts will assess whether the agency's actions were arbitrary, capricious, or in violation of the law or an abuse of discretion. Regardless of the protest forum, the common element in successfully defending against a protest is to have a complete well documented solicitation/ contract file and a detailed specific response to each and every protest allegation. This agency administrative record will set the tone in establishing that the protester was treated fairly, and that the agency's decisions were reasonable, and further that the acquisition was conducted properly.

THE FREEDOM OF INFORMATION ACT (FOIA)

1. INTRODUCTION

Enacted in 1966, the Freedom of Information Act (FOIA) established for the first time a statutory right of access to government documents. The complete text of the Act can be found at 5 United States Code, Section 552.

The underlying principle of the FOIA is government accountability. Under FOIA, virtually every record possessed by a Federal Agency must be made available to the public unless the record falls into one of the Act's nine exemptions from mandatory disclosure or is outside the scope of the Act's coverage, as in the case of certain personal documents.

2. PROCEDURAL REQUIREMENTS

a. Definition of "Agency Record":

FOIA applies to "records" maintained by "agencies" within the executive branch of the federal government. Not included are records maintained by:

- state governments
- municipal governments
- by courts
- by Congress
- by private citizens

The Supreme Court has articulated a two-part test for determining what constitutes an "agency record" under FOIA. Agency records are documents which are:

- (1) either created or obtained by an agency; and
- (2) are under agency control at the time of the FOIA request.

Thus, virtually every procurement-related document at DSS-W is an agency record and therefore, subject to FOIA. An exception to the general rule are personal records. For example, employee notebooks containing handwritten notes, created and maintained for personal convenience and not placed in agency files, were held by a court not to be agency records.

b. Who may make a FOIA request:

Any "person" may make a FOIA request. The statute defines "person" very broadly to include individuals (including foreign citizens), partnerships, corporations, associations, foreign governments, and domestic governments.

c. No justification is necessary when making a FOIA request. FOIA requests can be made for any reason whatsoever. There is no need to show relevancy. The purpose for which documents are sought has no bearing on the merits of the request. Therefore, FOIA requesters do not have to explain or justify their requests. However, in the area of fees and fee waivers the requester's purpose in requesting the information is an important factor. If the documents are requested for a commercial purpose, the requester must pay for search, reproduction and review/excising costs. On the other hand, if disclosure of the information is not primarily in the commercial interest of the requester, the fees are partially waived. For example, non-commercial requesters from educational/non-commercial scientific institutions or the news media must only pay for duplication charges in excess of 100 pages. All other non-commercial requesters must pay for search and duplication costs if more than two hours of search or 100 pages of records are desired.

d. Content of a FOIA Request:

The statute specifies only two requirements:

- (1) The request must reasonably describe the records sought.

The description of records being requested is sufficient if it enables a professional agency employee familiar with the subject area to find the record with a reasonable amount of effort.

- (2) The request must be made in accordance with the agency's published procedural guidelines.

For example, a requester must make a promise to pay all fees before his request constitutes a proper FOIA request. If requester fails to pay for one request, the agency can refuse to process all subsequent requests until the outstanding balance is paid by requester.

e. Time Limits:

Once an agency is in receipt of a proper FOIA request, it is required to inform the requester of its decision to grant or deny access to documents within 10 working days. Extensions of time are allowed in four situations:

- (1) The need to search for and collect documents from separate offices;
- (2) The need to examine a voluminous amount of records;
- (3) The need to consult with another agency or agency component; and
- (4) The need to contact the company or government contractor which gave us the documents (such as technical and cost proposals) in order to get their opinion as to whether release of the information would harm their company's competitive position.

f. Concept of Segregability:

FOIA requires that any reasonably segregable portion of a record be released after appropriate application of one of the nine exemptions. What this means is that we must do a line-by-line analysis of each document. Each sentence must be examined to see whether it falls into one of the nine exemptions. If one sentence of a document is exempt from release, this does not mean we can withhold the whole document. However, if an agency determines that the non-exempt material is so inextricably intertwined that disclosure of it would leave only essentially meaningless words or phrases, the entire record may be withheld.

g. Denials of Information:

Notifications of denials must inform requester of the reason for the denial; their right to appeals; and the name and title of each person responsible for the denial. DSS-W's requesters can appeal an Initial denial to the Secretary of the Army. If the Secretary of the Army doesn't give them the documents, they can go to Federal Court to seek release of the documents. "No record" determinations are appealable, so losing a document will not relieve the Government of the responsibility for making a thorough search for the document.

h. Other FOIA points to remember:

- FOIA applies only to "records" i.e., documents; however, it does include computer programs and software.
- Agencies are not required to create records in order to respond to a FOIA request.
- The Act does not recognize limited degrees of disclosure such as viewing but not copying of documents.
- Requesters cannot compel automatic disclosure of documents as they are created, which means that requests can not be made for future records not yet in existence.

3. FOIA EXEMPTIONS:

The Exemptions most commonly invoked regarding procurement related documents maintained at DSS-W are Exemptions 4 and 5.

a. Exemption 4 - Protects 1) trade secrets and 2) commercial or financial information obtained from a person that is privileged or confidential.

- A trade secret is a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding or processing of trade commodities and that is the end product of either innovation or substantial effort. There must be a direct relationship between the trade secret and the productive process.

- Protects "commercial or financial information obtained from a person that is privileged or confidential." Commercial means anything dealing with commerce. This is a very broad definition.

- Requires the information to have been obtained from a "person." A "person" can be corporation, state government or foreign government.

Information is privileged/confidential if disclosure is likely to:

(1) impair the government's ability to obtain necessary information in the future; or,

(2) cause substantial harm to the competitive position of the person from whom the information was obtained.

Examples of documents which are exempt from release under Exemption 4, either in whole or in part, are technical proposals, cost proposals, invoices, vouchers, business clearance memorandums, delivery orders, contracts, contract deliverables such as reports, technical evaluation panel reports, best and final offers, and technical discussion questions. Program offices receiving requests for procurement-related documents should consult with their DSS-W contracting officer before any release is made. Generally, program offices will respond to requests for contract deliverables and invoices. Requests for any other documents pertaining to DSS-W procurements should be referred to the DSS-W contracting officer for direct response to the requester. Program offices should consult with DSS-W wherever requests for procurement-related documents are received from the private sector.

b. Exemption 5. Protects inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency.

This is a discretionary exemption and it may only be invoked "in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption." (Attorney General Janet Reno's FOIA memorandum of October 4, 1993.) Three types of information are usually protected by exemption 5:

- deliberative process documents;
- attorney work product documents; and,

- documents pertaining to the attorney-client privilege.

1. The deliberative process privilege:

Protects the decision making process of agencies. Three policy purposes are served. First, the privilege encourages frank, open discussion on matters of policy between subordinates and superiors. Second, it protects against premature disclosure of proposed policies before they are adopted. Third, it protects against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. However, post decisional memorandums must be released, and entirely factual matters within a pre-decisional must be released. It should be noted that drafts of documents are considered pre-decisional.

2. The attorney work product privilege:

Protects documents and other memoranda prepared by an attorney in contemplation of litigation. This privilege may be invoked even if the litigation never actually commenced. This privilege also protects information relating to possible settlements of litigation.

3. The attorney-client privilege:

Protects confidential communications between attorney and his/ her client relating to a legal matter for which the client has sought professional advice. This applies to facts divulged by client to his attorney and also applies to opinions given by the attorney based on those facts.

Examples of procurement-related documents which may be withheld under exemption 5 include Agency Procurement Requests, Delegations of Procurement Authority, Business Clearance Memorandums, Independent Government Cost Estimated, individual Technical Panel members' score sheets, Technical Panel Chairman's Reports and Source Selection Authority's Reports. It should be noted that some procurement-sensitive documents lose their protected status after contract award has been made.

PART 3

REQUIRED SOURCES OF SUPPLIES AND SERVICES (FAR PART 8)

REQUIRED SOURCES FOR SUPPLIES AND SERVICES (FAR PART 8)

The Federal Acquisition Streamlining Act (FASA) of 1994 established a new category, Micro-purchases, which are acquisitions under \$2,500. Previously, all acquisitions for small purchases (now termed Simplified Acquisitions) required that the acquisitions be set-aside for small businesses. That requirement for buys under the micro-purchase threshold is now waived. Also, buys under \$2,500 should, whenever practicable, be made with the Government purchase card. However, this does not mean that the Government purchase card can be used without considering UNICOR, NIB/NISH, Stock programs, excess inventory, or Federal Supply Schedules. It also does not alter the current priority among Required Sources of Supplies and Services, or Simplified Acquisition Threshold and Other Simplified Purchase Procedures under Parts 8 and 13 respectively, of the FAR.

In accordance with FAR 8.001, Priorities for use of Government supply sources, agencies are required to satisfy requirements for supplies and services from or through the sources and publications listed below in descending order of priority --

(1) Supplies.

- (i) Agency inventories;
- (ii) Excess from other agencies;
- (iii) Federal Prison Industries, Inc. (also referred to as UNICOR);
- (iv) Products available from the Committee for Purchase From People Who Are Blind or Severely Disabled;
- (v) Wholesale supply sources, such as stock programs of the GSA, DLA, Department of Veterans Affairs, and military inventory control points;
- (vi) Mandatory Federal Supply Schedules;
- (vii) Optional use Federal Supply Schedules; and
- (viii) Commercial sources (including educational and nonprofit institutions).

(2) Services.

- (i) Services available from the Committee for Purchase From People Who Are Blind or Severely Disabled;
- (ii) Mandatory Federal Supply Schedules and mandatory GSA term contracts for personal property rehabilitation;
- (iii) Optional use Federal Supply Schedules and optional use GSA term contracts for personal property rehabilitation; and
- (iv) Federal Prison Industries, Inc., or commercial sources (including educational and nonprofit institutions).

The DSS-W Supply is a first source for agency inventories, excess from other agencies, and availability of supplies from wholesale programs, as well as from the National Industries for the Blind and National Industries for the Severely Handicapped.

FURNITURE PURCHASES/UNICOR WAIVERS

(Acquisition From Federal Prison Industries, FAR 8.6)

Any customer wishing to obtain modular/systems furniture must contact UNICOR to obtain a layout and design prior to the submission of furniture requisitions. UNICOR will either provide (i) the layout and design, or (ii) a waiver to obtain furniture from a commercial source. The waiver must then be submitted as an attachment to the agency furniture requisition.

A clearance is required from FPI before supplies on the Schedule are acquired from other sources, except when the conditions in Exceptions, below, apply. FPI clearances ordinarily are of the following types:

- General or blanket clearances issued when classes of articles or services are not available from FPI.
- Formal clearances issued in response to requests from offices desiring to acquire, from other sources, supplies listed in the Schedule and not covered by a general clearance. Requests should be addressed to Federal Prison Industries, Inc., Department of Justice, Washington, DC 20534.

Purchases from other sources because of a lower price are not normally authorized, and clearances will not be issued on this basis except as a result of action taken to resolve questions of price. Disputes regarding price, quality, character, or suitability of supplies produced by FPI are subject to arbitration as specified in 18 U.S.C. 4124. The statute provides that the arbitration shall be conducted by a board consisting of the Comptroller General of the United States, the Administrator of General Services, and the President, or their representatives. The decisions of the board are final and binding on all parties.

Exceptions. FPI clearances are not required when--

- Public exigency requires immediate delivery or performance;
- Suitable used or excess supplies are available;
- Purchases are made from GSA of less-than-carload lots of common-use items stocked by GSA (see Schedule A of the Schedule);
- The supplies are acquired and used outside the United States; or
- Orders are for listed items totaling \$25 or less that require delivery within 10 days.

A UNICOR representative can be reached at the UNICOR office at (202) 305-3941.

USE OF NONPROFIT AGENCIES UNDER THE THE JAVITS-WAGNER-O'DAY (JWOD) PROGRAM

The Javits-Wagner-O'Day (JWOD) Program usage is required by Federal Acquisition Regulation (FAR), Part 8, Required Sources of Supplies and Services. The Federal Acquisition Streamlining Act of 1994 and implementing regulations continue the requirement to buy JWOD items and services. Similarly, the Administration's recent Performance-Based Organization legislative package seeks no change in the JWOD Program. However the current emphasis on decentralized and more flexible procurement necessitates greater awareness of the JWOD Program and its benefits to Government customers and Americans with disabilities. JWOD education is most important for buyers without procurement backgrounds.

The JWOD Program creates employment and training opportunities for people who are blind or who have other severe disabilities. It's primary means of doing so is to require Government agencies to buy selected products and services from nonprofit agencies employing such individuals. As a result, JWOD employees are able to lead more productive, independent lives.

The JWOD Program is administered by the Committee for Purchase From People Who Are Blind or Severely Disabled, a small Federal agency. Two national organizations, National Industries for the Blind (NIB) and NISH (serving people with a range of disabilities), have been designated to provide support to participating State and private nonprofit agencies.

Specifically, the JWOD Program is **not** waived, superseded or bypassed by any of the following provisions:

- Micropurchasing authority - does not exempt Federal employees from statutory requirement to buy JWOD items under \$2500. Permits "non-contracting" employees to use IMPAC Purchase Cards, but not to buy commercial products which are essentially the same as JWOD Items.
- Buying "Off-the-Shelf" - agencies are no longer required to buy unique, Government-specified items, but again, cannot substitute commercial items for JWOD products.
- Simplified Acquisitions Under \$100,000 - unlike some procurement laws, the JWOD Act remains applicable under this threshold.

JWOD items are available to Federal employees primarily through the General Services Administration (GSA), the Defense Logistics Agency (DLA) or specific contractors authorized to purchase directly from JWOD-participating producers. While GSA remains the primary distributor of JWOD office products, both GSA and the JWOD team realize that some Federal customers desire special service which may be more economically provided by prime (commercial) vendors. Products furnished include office supplies, cleaners, textiles, military specific items and medical/surgical supplies. Many office products carry the SKILCRAFT brand

name. A wide array of JWOD services are also performed, from administrative work, custodial operations and grounds maintenance to order processing, switchboard operation and warehousing.

Federal customers can purchase mandatory JWOD office supplies from the following six national vendors under GSA Schedule 75 III A **with next-day desktop delivery**:

- Boise Cascade Office Products (888) 505-FEDS(3337)
- BT Office Supplies International (888) 862-8674
- Corporate Express (800) 706-9267
- Innovative Sales Brokers (800) 283-1903
- Office Depot (888) 263-9586
- Staples National Advantage (800) 538-2728

You may order by telephone, fax, or electronic data interchange (EDI). *Walk-in store purchases are not included.* The vendors accept IMPAC Cards, or if you prefer, submit invoices. Blanket Purchase Agreements (BPAs) between agencies and the vendors are permitted.

You can also comply with your agency's policy to use the Government IMPAC Purchase Card whenever possible and at the same time support the JWOD Program. All distributors of JWOD office supplies and common-use items accept the IMPAC Card.

GSA Advantage! On-Line Shopping Service allows you to browse, search for specific items, review prices and place orders via the Internet. You choose the delivery times and the payment method, including the IMPAC Card. GSA Advantage! is being developed incrementally, with Stock Program ordering open; schedules and special order items being phased in. You can visit GSA Advantage! at <http://www.gsa.gov>, or call (703) 305-7359 for more information.

The DSS-W is a first source for agency inventories, excess from other agencies, and availability of supplies from wholesale programs, as well as from the National Industries for the Blind and National Industries for the Severely Handicapped. The DSS-W Supply Division maintains a catalog containing a comprehensive list of all products provided by NIB and NISH. A handy reference guide for items supplied by NIB and NISH is contained in the JWOD Handbook and is maintained in the DSS-W Commodities and Services Division, and the DSS-W Supply Division, as well.

PURCHASES FROM GSA SCHEDULE CONTRACTS

1. Federal Supply Schedule Contracts. Under the schedules program, GSA enters into contracts with commercial firms to provide supplies and services at stated prices for given periods of time. Orders are placed directly with the schedule contractor, and deliveries are made directly to the customer. The Federal Supply Schedule Program (FSSP) mirrors commercial buying practices. It provides customers with literally millions of state-of-the-art, high-quality commercial products and related services at volume discount pricing on a direct delivery basis.. FSSP also offers the benefits of shorter lead-times, lower administrative costs, and reduced inventories. FSSP is very effective at delivering low-cost high quality commercial items with a minimum of administrative time and cost.

2. Multiple Award Schedules (MAS). General Services Administration Multiple Award Schedules (MASs) are awarded to vendors supplying comparable commercial supplies and services at varying prices. They provide customers with the variety and the flexibility necessary to select the best value item that meets their needs at the lowest overall cost (the price of the item plus administrative costs), Ordering procedures emphasize customer discretion, while minimizing paperwork.

3. Using Schedules.

(1)(a) When agency requirements are to be satisfied through the use of Federal Supply Schedules, the policies and procedures of FAR Part 13 do not apply. When placing orders under a Federal Supply Schedule, ordering activities need not seek further competition, synopses the requirement, make a separate determination of fair and reasonable pricing, or consider small business set-asides in accordance with Subpart 19.5.

(b) Optional use. (1) Ordering activities can place orders of \$2,500 or less with any Federal Supply Schedule contractor. GSA has already determined the prices of items under these contracts to be fair and reasonable.

(2) To reasonably ensure that a selection represents the best value and meets the agency's needs at the lowest overall cost, before placing an order of more than \$2,500, an ordering activity should--

(i) Consider reasonably available information about products offered under Multiple Award Schedule (MAS) contracts; this standard is met if the ordering activity does the following:

(A) Considers products and prices contained in any GSA MAS automated information system; or

(B) If automated information is not available, reviews at least three (3) price lists.

(ii) In selecting the best value item at the lowest overall cost (the price of the item plus administrative costs), the ordering activity may consider such factors as--

(A) Special features of one item not provided by comparable items which are required in effective program performance;

(B) Trade-in considerations;

(C) Probable life of the item selected as compared with that of a comparable item;

(D) Warranty conditions; and

(E) Maintenance availability.

(iii) Give preference to the items of small business concerns when two or more items at the same delivered price will meet an ordering activity's needs.

(3) MAS contractors will not be required to pass on to all schedule users a price reduction extended only to an individual agency for a specific order. There may be circumstances where an ordering activity finds it advantageous to request a price reduction, such as where the ordering activity finds that a schedule product is available elsewhere at a lower price, or where the quantity of an individual order clearly indicates the potential for obtaining a reduced price.

(4) Ordering activities should document orders of \$2,500 or less by identifying the contractor the item was purchased from, the item purchased, and the amount paid. For orders over \$2,500, MAS ordering files should be documented in accordance with internal agency practices. Agencies are encouraged to keep documentation to a minimum. Consistent with the Competition in Contracting Act, MASs are competitive in that:

- Participation in the program has been open to all responsible sources; and
- Orders and contracts under such procedures result in the lowest overall cost alternative to meet the needs of the Government.

MAS contractors are required to prepare and distribute catalogs/pricelists which must be used with the schedule when preparing orders.

FINANCIAL MANAGEMENT SYSTEMS SOFTWARE (FMSS).

SCOPE OF THE PROGRAM: GSA has awarded contracts under the **mandatory** Financial Management Systems Software (FMSS) MAS Program. Use of the MAS contracts is mandatory for all agencies in the Executive Branch of the Federal Government (excluding the U. S. Postal Service) for the acquisition of commercial software for primary financial management (accounting) systems and for the acquisition of services and support related to the implementation of such software packages. Until expiration of any other contractual agreements that precede the award of these contracts, the FMSS schedule contracts are optional for the acquisition of services and support for those agencies already holding license agreements for the packages that are on the Schedules.

With input from the requesting activity, the contract specialist shall conduct a competitive analysis of the schedule contractors and issue a delivery order to that contractor which best suits the user's needs. Agencies are not required by the terms of the FMSS program to award to the lowest price schedule contractor; provided that their selection plans, evaluation and award factors, and internal agency acquisition regulations allow for selection of other than the lowest price offer.

Hardware platforms supported under the contracts include IBM, IBM COMPATIBLE PC, HP, UNISYS, DEC VAX, SEQUENT, PYRAMID, Silicon Graphics, SUN, INTEL, Motorola, MIPS, ES-900, RISC-based mini-computers, and hardware utilizing MVS/XA, MVS/ESA, MVS/SP, MS-Windows, OS/2, VMS, MS-DOS, AIX, XENIX, UNIT, IRIX, Solaris, HPUS, OSF, AUX, ESIX, ALTOS, ULTRIX, DATA GENERAL UX, MVS NT with RDBMS and VM UNIX operating systems.

Full information regarding the FMSS Program, including contract numbers, company names, ordering addresses, contact points, telephone numbers Taxpayer Identification Numbers (TIN), and contract period, and ordering instructions, can be obtained from the following web site: **www.gsa.gov/commerce.htm**.

WAIVERS: If an agency determines it cannot satisfy its requirement for primary financial management (accounting) systems software through the schedule, a waiver must be obtained from GSA. GSA will coordinate the waiver requests with the OMB. The request must state the reasons the Schedule software does not satisfy their requirements and describe where the agency's requirements exceed the boundaries of the software provided under the Schedule contracts. In addition, the request shall identify how the agency proposes to satisfy its needs for the financial management system software.

The waiver request shall be submitted in writing to: FMSS Contracting Officer, General Services Administration, ITS, Procurement Services Center (KRB), 18th & F Streets, NW., Room G-219, Washington, DC 20405. GSA will review and grant or deny the waiver within 60 calendar days of receipt.

PART 4

ACQUISITION OF

COMMERCIAL

ITEMS

ACQUISITION OF COMMERCIAL ITEMS

BACKGROUND:

With passage of the Federal Acquisition Streamlining Act (FASA) in 1994, Congress signaled a dramatic shift in the course of procurement policy for the federal government. FASA is the most far-reaching procurement reform in the last fifty years. Central to the FASA reforms are the mandates to maximize the utilization/acquisition of commercial items, and to acquire those items in a manner similar to that used by the commercial business sector.

To implement FASA, experienced procurement personnel from various federal agencies were formed into several teams, each tasked to draft new Federal Acquisition Regulation (FAR) language to incorporate the FASA changes. After considering public and agency comments, the new commercial item rules in FAR Part 12 (hereafter referred to as Part 12) were implemented late in 1995.

PURPOSE:

This information is to provide insight into the rationale for some of the changes, to provide additional information/explanation on key areas of interest, and to highlight specific issues that may be of special importance for all agencies. It is intended to be a common sense guide for those who are first using the new commercial items rules in Part 12.

A Note on Services: Although some services are included, the new Part 12 focuses primarily on commercial items that are supplies. This section will address only the acquisition of commercial items that are supplies. Discussions are ongoing regarding other services, so be alert for changes.

OVERVIEW

The FASA definition of “commercial item” (FAR Part 12) is extremely broad. Its many items, previously considered to have only Government/military application, are now considered to be commercial.

The two biggest changes brought about by FASA are the increased attention to market research as an integral part of the procurement process, and the significant discretion allowed to the contracting officer (CO) in acquiring commercial items. Market research is discussed at some length later, but, for informational purposes, the “new” CO role is highlighted here.

The new FAR rules for commercial items are a far cry from the generally prescriptive language we’re used to seeing there. Instead, they are intentionally written as guiding principles, to allow for significant exercise of business judgment by the government contracting officer throughout the conduct of a commercial item acquisition. The policies and procedures will rely heavily on the education, training, and professional expertise of our contracting officers for their effective conduct. Under the new rules, the contracting officer has extremely broad authority to

conduct a procurement action for commercial items in a manner determined to be consistent with customary commercial practice. The regulations now **require** significant exercise of business judgment. Complete documentation of market research findings, determinations of customary commercial practices, offer/item evaluations, and pricing decisions is now the norm.

There can be little doubt that it will take some time for persons involved in the requisitioning and acquisition process to adapt to and become comfortable with the changes wrought by FASA. This paper is intended to support those persons by highlighting several areas of special interest. For additional information or assistance on matters relating to the acquisition of commercial items, contact the Office of Acquisition Policy (see cover page for addresses).

GOVERNMENT AS VOLUME PURCHASER

Everyone knows that FASA has brought a lot of changes. Our new solicitations and contracts now look a lot different - they look a lot like commercial solicitations and contracts. But, as Government employees, we still have the special responsibility to serve the taxpayers of our nation fairly and wisely. That hasn't changed at all. If your procurement action is a significant one, you are expected to fully utilize any market leverage associated with that volume purchase to gain the most favorable pricing, terms, and conditions for the federal government. Utilization of volume purchasing leverage is most assuredly a commercial practice.

RELATIONSHIP OF FAR PART 12 TO PARTS 13, 14, & 15

If your acquisition involves commercial items, the contract specialist **must** use the procedures and policies outlined in Part 12. In conducting that acquisition, the specialist is free to use the procedures in Part 13 for Simplified Purchases, Part 14 for Sealed Bidding, or Part 15 for Negotiation. If there are inconsistencies between any other FAR sections and Part 12, the Part 12 language will take precedence. The determination as to the most appropriate acquisition procedure is still the decision of the contracting officer.

MARKET RESEARCH

Many commercial buyers are commodity "experts," knowledgeable as to the products or product groups that they acquire for their firms - and now the same will be expected of government buyers. For commercial item acquisitions, market research is necessary to provide the CO a full understanding of the commercial marketplace within which the acquisition will be conducted. Market research will establish the basis for CO determinations of customary commercial practice for acquisitions of commercial items.

The Specs - One aspect of the significant emphasis placed on market research early in the requisitioning cycle is intended to ensure that, if commercial items are available to satisfy the government requirement, then those commercial items will be acquired - *rather than a government-unique item*. This is pretty much a non-issue for Government purchases now. Virtually all the supplies acquired by this agency are commercial items. Those of you who

support other agencies that specify government-unique requirements need to pay special attention to this matter. See FAR Part 11.)

Terms & Conditions (T's & C's) - This is likely to be the primary focal point for Government persons involved in market research: establishing the terms and conditions that are customarily used in commercial contracts for the item or items being acquired. FAR 52.212-4 sets forth some typical generic T's & C's, but those may or may not work for your particular acquisition. Customary commercial T's & C's are likely to vary significantly among various commodity groups. It is the responsibility of the contracting officer to ensure that, to the maximum extent practicable, only those clauses required to implement provisions of law or executive orders or those that are consistent with customary commercial practice are utilized in contracts for commercial items [12.301(a)]. FAR 12.302(c) prohibits the CO from adding Ts & Cs that would violate customary commercial practices:

FAR 12.302(c) *"The contracting officer shall not tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures."*

Who Does It and When? - You do, as the requiring agency, when you are initially planning for your requirement. FAR Part 7, Acquisition Planning, requires agencies to "perform acquisition planning and conduct market research (FAR Part 10), for all acquisitions in order to promote and provide for (1) Acquisition of commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items, to the maximum extent practicable; and (2) Full and open competition (FAR Part 6) or, when full and open competition is not required in accordance with Part 6, to obtain competition to the maximum extent practicable, with due regard to the nature of the supplies or services to be acquired.

How? - Look through industry publications, periodicals, vendor associations, trade journals, marketing organizations, trade shows - any or all of these might be sources at which to direct your market research. Once you start looking, you will probably be surprised at how much information is out there. (If you're so inclined, use the Web.) You might ask vendors to submit copies of their standard commercial agreements, ask associations or industry groups for sample agreements, or even schedule a public meeting and ask interested industry folks for their input. (FYI, the National Association of Purchasing Management publishes a compilation of contract/purchase order terms and conditions.) Whatever means you choose, your market research effort should be commensurate with the magnitude of your procurement action.

The emphasis on market research is new; it probably won't be easy, and neither is it likely to be quick. But, market research will be critical to the successful conduct of your procurement action for commercial items. As the FAR changes, market research will become an on-going activity for requirements personnel and contracting officers alike. Like commercial buyers, we will be expected to keep abreast of the latest developments in the commodity areas from which

our acquisitions are made. After the first time, market research should be a much less fearless task.

Documentation CO determinations regarding “customary commercial practice” for any particular acquisition are almost certain to have a significant impact on the conduct of that procurement, since those decisions may be subject to protest. Complete documentation of market research, along with the considerations and rationale for resultant determinations, will be essential.

WHAT DOES “CUSTOMARY COMMERCIAL PRACTICE” MEAN?

Adequate market research and full understanding of the commercial marketplace associated with a particular acquisition will form the basis for determining what is and what is not customary commercial practice. There’s no way to put a number or percentage on this, or establish any sort of easy yardstick for measurement. It will be a discretionary decision of the contracting officer, made within the context of each individual situation.

A couple of examples may shed some light on this matter. Contract financing may be a customary commercial practice for bulk fuel oil contracts but not for furniture contracts. Or, contract financing might be customary commercial practice for significant ADP acquisitions but not for relatively smaller ones. Again, for emphasis, customary commercial practice is determined by the contracting officer within the context of the marketplace for each individual procurement requirement.

THE UNIFORM CONTRACT FORMAT

You’ve seen this old horse for years, and it served it’s purpose, but now it’s gone for commercial items. It doesn’t work with the SF 1449. Your contract specialist can’t use it, and you won’t see it on your new contracts. Contracts under Part 12 will be significantly shorter, so offerors and contractors can reasonably be expected to read the whole thing.

What About Standardization? - Market research to determine customary commercial practices should result in a contract for hand tools that is similar to a DLA contract for hand tools, a NASA contract for hand tools, and a Ford Motor Company contract for hand tools, etc. Those government agency contracts won’t be identical by any means, but they should be somewhat similar. But, there may be significant differences in those agency contracts. In allowing for increased flexibility, the new FAR changes move distinctly away from standardization.

TERMS & CONDITIONS

Many commercial firms have two preprinted forms showing their T’s & C’s: one is used when the firm is the purchaser of goods, the other is used when the firm is the seller. Typically the seller and buyer T’s & C’s are significantly different - even for the same firm. That’s because the interests of the buyer and the seller in a transaction are significantly different, and the T’s &

C's are designed specifically to protect those differing interests. In the commercial sector, virtually all T's & C's are negotiable, and most contracts end up being a negotiated compromise of buyer and seller T's & C's that balance and protect both parties' interests.

Part 12 allows CO's to accept offers showing different T's & C's. Your requirement (and ultimately, the solicitation) should indicate which T's & C's are negotiable (i.e., allow consideration of alternatives that may be offered) and which are not. Be aware that there are differences in seller and buyer T's & C's, and know that you don't have to accept the offeror's terms. Marketing leverage is likely to be the key. If the buy is small, the seller may not find it worth his time to negotiate T's & C's; he might just say, "These are my terms, take 'em or leave 'em." But if the specialist is negotiating a large contract, by all means they should be expected to use that market leverage to negotiate T's & C's that protect and are favorable to the government's interests.

Evaluation of Differing Terms & Conditions While this is a whole new ball game for government procurement persons, it's likely to be a difficult area. The possible alternatives that may be offered for consideration are virtually limitless. For one simple example, consider the warranty. For a best value acquisition of scientific equipment items, Firm X offers a one-year warranty while Firm Z offers a higher price but includes a two-year warranty. During negotiations, Firm X increases its warranty offer to eighteen-months. Both firms' prices are unchanged. Which is better? The CO and requirements personnel will have to consider whether the additional 6 months of warranty coverage is worth the higher price. (This is just one element of the overall evaluation, singled out here to demonstrate the point.) There may not be a single "right" answer. It's a judgment call, allowing full exercise of your professional expertise. Whatever the choice, all files must fully document the rationale for the decision.

QUALITY ASSURANCE

Another area of significant change - the Government is essentially out of the business of quality assurance [12.208]. No Government inspection is allowed before the contractor tenders items for delivery unless in-process inspection is customary commercial practice for the item being acquired.

Does That Mean We Don't Care About the Quality of the Items We Contract For?

No! We do care - very much! We can still inspect (after receipt), and can still reject nonconforming supplies. And, if it's customary commercial practice (i.e., if we're buying airplane generators, and commercial firms that buy airplane generators typically perform in-process inspections during production of those generators), then our contract can allow us to conduct those same in-process inspections. But realistically, formal inspection of supplies is likely to become increasingly less the norm under the new rules. Instead, we're going to rely on the integrity of our contractors to deliver acceptable products - yet retain contractual protections for those instances where we later find unacceptable ones.

When we contract for commercial items, we are at the same time contracting for that firm's commercial quality assurance system - whatever that is. Product quality is likely to become a more significant factor in award decisions. If appropriate, the evaluation should be structured to score more heavily toward those firms that have independently been recognized (i.e., ISO 9000, Baldrige Award, etc.) as quality suppliers. Consideration of past performance in award decisions can help us avoid suppliers of marginal (or worse) commercial items, and rate quality contractors more highly. Finally, the contract warranty provisions should provide another measure of protection to ensure that the Government receives products of satisfactory quality.

PAST PERFORMANCE

Consideration of an offeror's past performance in making award decisions is typical of commercial acquisitions. The FAR recently was amended to mandate consideration of past performance in all government award decisions, including those for commercial items. Consideration of an offeror's past performance should better enable us to contract with quality suppliers.

STREAMLINED SOLICITATION

FAR 12.603 establishes an optional streamlined solicitation procedure for commercial items. The procedure is designed to reduce the time required to solicit and award contracts for noncomplex items. The procedure expands the information to be published in the CBD synopsis notice, so that the synopsis notice effectively serves as the solicitation.

RESPONSE TIME

Solicitations for commercial items are no longer required to remain open for 30 days [FAR 5.203(b)]. The CO should consider the circumstances of the particular acquisition (including customary commercial practice, of course) and establish a response time which will allow a reasonable opportunity to respond.

Insider Note: During the development stages, the Commercial Item Team looked high, low, and everywhere else - but the 15-day synopsis requirement is statutory and it can't be touched. For the very shortest response time (for acquisitions over the Simplified Acquisition Threshold (SAT), the specialist should consider using the streamlined solicitation procedure at 12.603. In the appropriate circumstances, the offer due date could be Day 16 after synopsis publication.

Note the provision regarding Late Offers at FAR 52.212-1(f). There's no mention of "sent by U. S. Postal Service Express Mail Next Day Service" or "sent by registered or certified mail," etc., etc. In plain English, what that says is "**LATE IS LATE!**" The offeror assumes full responsibility and risk for timely delivery of the offer. If it doesn't arrive before the deadline, for whatever reason, it's not considered. That's the norm in the commercial world.

OFFERS

Product Literature: The FAR encourages CO's to use an offeror's existing product literature to show product capabilities, rather than unique technical proposals (12.205). ("Product literature" here means, for example, the product data sheet and instructions that came in the box with the VCR you bought last week.) Typically, existing commercial product literature contains a wealth of information on capabilities, statistics, and performance that can be used to determine whether an offered item satisfies our requirement. That same literature can also be used to compare competing products.

Multiple Offers: FAR 12.205 recommends that firms be allowed to offer more than one item in response to a solicitation for commercial items. In conjunction with our performance specification, the Government envisions companies offering one or more products (all of which will satisfy our requirement) from their standard product line, so that we can select the one we determine to be the best value purchase. For example, a pocketknife manufacturer might offer 3 models from his catalog, ranging from his top-of-the-line highest priced model down to the basic single-blade, olive drab pocket knife. If our solicitation so allows, we can select the model that represents the best value for our specific intended use.

OFFEROR REPRESENTATIONS & CERTIFICATIONS (Reps & Certs)

This is now one standardized and significantly shortened list. Many firms will be able to complete these reps and certs once, and simply copy that first completion for all subsequent offers (unless something happens to affect one of the certs, obviously).

EVALUATION OF OFFERS

As mentioned, the FAR encourages the submission of existing product literature. That same literature may be used, where possible, to evaluate items offered (12.602. Use of periodicals such as Consumer Reports and other independent product reviews for evaluation purposes could be appropriate in some circumstances. Be careful that if you do use product reviews, they must be independent. As always, use of such information must be fully documented.

CAUTION-CAUTION-CAUTION: Some product literature is pure, unadulterated hog-wash advertising. **Advertisements must not be considered in evaluating offers.** Examples of advertising may include celebrity endorsements and unsubstantiated opinions ("Tastes great!" "Less filling!"). Be careful to distinguish factual product literature from advertising material, and to disregard the latter.

STREAMLINED BEST VALUE EVALUATION: FAR 12.602 outlines a streamlined best value approach to evaluate offers for commercial items. It is a much simplified source selection procedure which allows considerable discretion in selecting the successful offeror. It may be appropriate for a wide range of commercial products. The procedure itself is streamlined, but the key to successful use will be full documentation of the award decision, including discussion of trade-offs considered and made.

PLEASE HELP ME!

OK, you've read all the wonderful stuff here, and you still don't have a clue where to begin? Here's a suggestion to get you started on your acquisition for commercial items.

1. ***Perform the necessary market research.*** No questions, no debate: It has to be done. If you don't have a sound basis to determine what is and what is not customary commercial practice for this acquisition, you're asking for trouble. Do it - and fully document what you did and the results. OR, contact your acquisition office for assistance.
2. Part 12.303 shows a suggested outline for the contract specialist to use in the solicitation. Now they will have to adapt that outline to your particular acquisition.
3. This is where your understanding of the commercial marketplace (i.e., the results of your market research) comes into play. It is absolutely critical that you be able to establish what is - and what is not - customary commercial practice for acquisitions similar to yours. The CO has broad latitude to tailor 52.212-1, 52.212-2, and most portions of 52.212-4 to conform to customary commercial practice. (52.212-3 and 52.212-5 are off-limits. You need a FAR deviation to revise anything in *those* provisions!) Tailoring that is inconsistent with customary commercial practice requires formal waiver approval in accordance with agency procedures [12.302(c)].
4. With the outline and your understanding of the commercial marketplace, go through your last requirement to get an idea of what in the outline fits, what needs to be revised, and what has to be added. The CO may have to tailor 52.212-1 to be appropriate for your specific requirement. 52.212-2 establishes a simplified best-value evaluation of offers. The CO may use that, tailor it, or discard it completely and use another more appropriate evaluation scheme. Particular attention will be paid to the terms and conditions in 52.212-4. They are intentionally plain-vanilla generic. The CO can tailor them [but cannot tailor Assignments, Disputes, Payment, Invoice, Other Compliances, and Compliance with Laws Unique to Government Contracts; 12.302(b)] to fit your requirement.
5. The CO may use the clause matrix to provide guidance on the proper utilization of other FAR or agency clauses. It should be emphasized that the matrix is guidance. As of this moment, FAR has not yet mandated the inclusion of any additional clauses in solicitations/contracts for commercial items.
6. ***Suggestion:*** Where customary commercial practice indicates that a particular matter should be the subject of a provision or clause, compare existing FAR and/or other agency provisions and clauses to ascertain differences between those and the commercial practices. The CO shouldn't pile up the contract with unnecessary provisions and clauses, but still should not be afraid to use ones that are deemed appropriate for the particular acquisition.

If the specialist does tailor one of the Part 12 provisions, it will be marked “Tailored.” The same goes for any other FAR or agency clauses that has been revised and included in your solicitation/contract.